SENTENCING NOW AND IN THE FUTURE

Materials prepared for a seminar held in Halifax, Nova Scotia on March 3 & 4, 1989.

Course Co-ordinators:

His Honour Judge W. C. Atton	- Provincial Court
Judge Robert C. Levy	- Family Court
David J. Bright	- Boyne Clarke
R. Gerald Conrad	- Department of Attorney General
Patrick M. Griffin	- C.L.E. Nova Scotia
D. William MacDonald	- Deputy Attorney General
Kathleen M. Waters	- Department of Solicitor General

Instructors:

His Honour Judge W. C. Atton	- Provincial Court
Bruce Archibald	- Dalhousie Law School
Duncan Beveridge	- Burke, Beveridge
David J. Bright	- Boyne Clarke
Theresa Clarke	- Victims Co-ordinator (Manitoba)
Vincent del Buono	- Department of Justice (Canada)
Jim Davidson	- Correctional Service Canada
William Digby	- Nova Scotia Legal Aid
Patrick Duncan	- Lambert & Duncan
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Inspector Ron Grantham	- Halifax Police Department
Martin Herschorn	- Department of Attorney General
Douglas Hunt	- Assistant Deputy Attorney General (Ontario)
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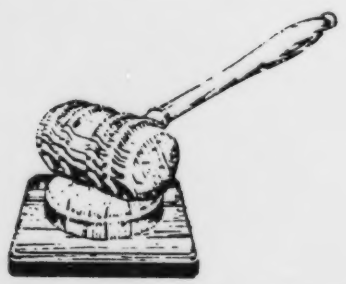

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"SENTENCING NOW AND IN THE FUTURE"

A SUMMARY OF THE PROCEEDINGS

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MARCH 3 & 4, 1989
HALIFAX, NOVA SCOTIA

Preamble

A two day seminar entitled "Sentencing Now and in the Future", sponsored by the Nova Scotia Departments of Attorney General and Solicitor General, was convened at the Hotel Nova Scotian on March 3 and 4, 1989. Approximately 200 registered delegates from all sectors of the criminal justice system attended.

The intent of this document is to provide a brief summary of the papers presented during this seminar, as well as to offer an overview of the discussion which took place following each of six panel presentations. Readers wishing to obtain copies of the papers in their entirety are advised to correspond directly with the respective authors.

Members of the Program Committee which coordinated the seminar were as follows:

His Honour Judge W.C. Atton, Provincial Court (N.S.)
Judge Robert C. Levy, Family Court (N.S.)
David J. Bright, Boyne Clarke
R. Gerald Conrad, Dept. of Attorney General (N.S.)
Patrick M. Griffin, Continuing Legal Education (N.S.)
D. William Mac Donald, Deputy Attorney General (N.S.)
Kathleen M. Waters, Dept. of Solicitor General (N.S.)

The seminar consisted of six panel presentations, each dealing with a particular aspect of sentencing. Panelists for each of these sessions are listed below.

1. <u>Sentencing Principles</u>

His Honour W.C. Atton, Provincial Court of Nova Scotia
William Digby, Nova Scotia Legal Aid
Adrian Reid, Crown Attorney, Department of the Attorney General, N.S.

2. <u>Sentencing Visible Minorities</u>

Bruce Archibald, Dalhousie Law School
Rupert Ross, Crown Attorney, Department of the Attorney General, Ontario
E. Anthony Ross, Smith, Gay, Evans & Ross

3. <u>Plea Bargaining</u>

Douglas Hunt, Assistant Deputy Attorney General, Ontario
Inspector Ron Grantham, Halifax Police Department
Duncan Beveridge, Burke & Beveridge

4. **Assessment of Present Sentencing System And Prisons**

Pat Duncan, Lambert & Duncan
James Crane, Department of Solicitor General, N.S.
Jim Davidson, Correctional Service of Canada

5. **Legislative Developments Relating To Victims**

Martin Herschorn, Department of Attorney General, N.S.
Elissa Lieff, Department of Justice Canada
Theresa Clarke, Victims Co-ordinator, Manitoba

6. **Future Initaitives - The Challenge of Change**

Vincent del Buono, Department of Justice Canada
Paula Kingston, Department of Solicitor General Canada

Funding for the conference was provided by the federal Ministry of the Solicitor General and Justice Canada.

Opening Remarks

The Honourable Lorne O. Clarke
Chief Justice of Nova Scotia

On behalf of the sponsors and the organizing committee, Chief Justice Lorne O. Clarke officially opened the conference by welcoming all delegates. In delivering his opening comments, he called on all those involved in the criminal justice system - government employees, professional organizations and the academic community - to assist in developing new approaches to sentencing. He noted that the justice system has been subjected to increased public scrutiny in recent years, and that sentencing itself is the most visible process of the justice system. Chief Justice Clarke reflected on the fact that in recent years, fewer appeals have been launched, which he felt provided some indication of the increased confidence in the judiciary on the part of counsel.

In closing, he wished the delegates well in their examination of present and future sentencing practices.

PANEL ONE

Sentencing Principles

His Honour Judge W. C. Atton

In his address to the conference, Judge Atton stated that although volumes have been filled with case law regarding sentencing, "the principles that have been established are general in nature and have neither served as a structure for, nor a limit upon the vast discretion bestowed upon the sentencing judge".

The view that sentences should be tailored to suit the individual offender, as opposed to the individual offence, dominated jurisprudence until the mid-sixties at which time the courts of appeal first recognized uniformity of sentence as a valid objective. Appeal courts have nonetheless demonstrated a reluctance to embrace fully the notion of uniformity, for fear that broad general principles will fail to take into account the unique circumstances of each offender. The Canadian Sentencing Commission (1987) reviewed over 1000 sentencing decisions which revealed that although general principles of sentencing are discussed in some judgments, there was no consensus as to either the priority of principles or their meaning. The Canadian Sentencing Handbook (1982) furthers this notion by referring to the importance of "blending the principles of sentencing".

When a sentencing principle is cited, it is most likely to be "general deterrence", especially when incarceration is imposed. Some courts have complained that this principle represents "the illogicality of punishing one person for what others might do". On the other hand, judgments which cite "rehabilitation" are most often used to support a decision not to incarcerate. A study reported in Sentencing (Canada, 1984;17) revealed considerable variation among 200 judges who were asked to assign sentence in an identical set of simulated cases. The study showed that the differences in sentence were related to the differences of opinion among the judges with respect to the aims of sentencing.

The general principles of deterrence, reformation or rehabilitation of the offender and retribution have been acknowledged by every court of appeal in Canada at one time or another. In recent years however, the courts have given general endorsement to the principle of protection of society.

In closing, Judge Atton acknowledged the difficulty of putting sentencing principles into practice, especially with increasing numbers of accused appearing before the courts each year.

Mr. Adrian Reid
Crown Attorney
Dept. of the Attorney General
Nova Scotia

In responding to Judge Atton's presentation, Mr, Reid noted that the application of sentencing principles is more difficult than their articulation. "The public perception of sentencing is that there are no principles upon which the sentence is based; and that there is great sentencing disparity".

This is because the process is highly individualized in that the penalty must relate to the "offender" as well as to the "offence". This individualization gives rise to advocacy, and ensures the relevance of the process to the needs of society (with different principles of sentencing being emphasized at different times).

The role of the defense is to act as an advocate for the accused. As a result, in speaking to sentence, defense counsel will frequently cite the importance of the "rehabilitation of the offender" as a sentencing principle. Since the principle of deterrence is often stressed when custody is ordered, the role of the Crown in sentencing is often to convince the judge of the importance of general deterrence. Slanting the judicial process toward the accused, rather than toward the offence, tends to militate in favour of the accused, whereas the opposite emphasis may result in the accused being "sacrificed on the altar of general deterrence".

William Digby
Nova Scotia Legal Aid

Mr. Digby began his comments by stating that he has difficulty with the Grady case (R v. Grady (1974), (10 N.S.R. (2d) 90 (N.S.S.C., App. Div.)), in that it provides no practical guidance for the sentencing process. Judges use Grady only as a cantation to "ward off the appeal division". Mr. Digby noted that in his view, the maximum sentences in the Criminal Code should be realigned so that they are more in line with the typical sentences imposed. Mr. Digby recommended that the judiciary should more frequently address the accused, in a language he/she can understand, to underscore that the accused is accountable to the courts. He further recommended that the accused should be asked to report back to the sentencing judge to give account for his/her behaviour upon completion of the imposed sentence. "To whom do the judges (now) speak?" asked Mr. Digby. "They speak not to the accused, but rather to the appeal courts, and to lawyers".

Mr. Digby drew attention to the need to establish residential facilities for offenders who are mentally ill. He

added that prisons are ill-equipped to deal with this group of offenders who have special needs for medical/psychiatric treatment.

The Discussion

Concern was expressed by one member of the audience that many guilty pleas come from accused persons who are not represented by counsel.

Another member of the audience raised a concern about the sentencing of "slow" offenders, especially those who are drug-dependent, questioning the relevance of the Grady decision in such circumstances. Another seminar participant stated that the court is obliged to "de-mystify" the sentence which is imposed. This speaker remarked that it is important to "know your judges" in advance of defending a client in order to increase the opportunity to acquire a sentence at the lower end of the range.

Discussion then ensued regarding the practical application of "general deterrence". Whereas one speaker expressed the view that harsher sentences have had the effect of decreasing the rate of impaired driving, another speaker contended that these have had no real effect because "99% of the population do not know what the penalty is for impaired driving, and the other one percent don't think they'll get caught". Also in terms of general deterrence, a speaker said that jail is not always a deterrent because some people have little or nothing to lose. The prospect of going to jail obviously does not concern them in the same way it would concern a person for whom the prospect of jail is abhorrent.

A speaker noted that sentencing principles now exist only in the abstract. In his view, the system of criminal justice would be improved by establishing a more formal and stringent protocol for sentencing.

PANEL TWO

Sentencing Visible Minorities

Bruce Archibald
Law Professor
Dalhousie Law School

"The Canadian criminal justice system is facing serious criticism for being racist", noted Mr. Archibald in his opening remarks. Sentencing judges have no choice in determining which cases will be brought before them, nor do they have any control over the behaviour of the police in either the detection of crime or the apprehension of suspects. Therefore, judges cannot be held accountable for the disproportionate number of accused persons who are members of visible minority groups.

Systemic discrimination; (i.e.institutionalized racism which is often evidenced by social patterns or legal practices demonstrating disproportionate adverse impacts against an identifiable group), is often unintentional. The extent to which the sentencing process is, or is perceived to be, systemically discriminatory against visible minorities is a topic of great debate in Canadian society. It is well documented that visible minority groups are over-represented in Canadian prisons, by comparison to their proportion in the population as a whole. This is not, in and of itself, evidence of racial discrimination in sentencing. Racial imbalances in prison populations may be the result of systemic discrimination from many sources, but there is still a perception that sentencing practices are nonetheless discriminatory.

Although early social science research suggested that sentencing practices were racially discriminatory, the bulk of modern sociological literature indicates that most of the early research was methodologically flawed. When one controls for legal variables (i.e. seriousness of the offence, prior record, etc.) there is no significant relationship between the race of the accused and the sentencing outcome. Reliance on statistical data may mask the appearance of discriminatory practices because some judges may discriminate in favour of some accused persons, while other judges may discriminate against them. Unintentional discrimination against visible minority groups may take place as a result of factors which seem extraneous, such as the absence or presence of an employment record, when consideration is given to whether or not an accused person will be an appropriate candidate for a less punitive sanction (such as a rehabilitative program). Since rates of unemployment tend to be much higher among visible minorities, some American jurisdictions have prohibited reference to employment record in the sentencing process.

The criminal justice system must address the issue of systemic discrimination and the widespread public perception that there is racial discrimination in the sentencing process itself. Professor Arcibald believes that the purposes of criminal justice sanctions must be distinguished from the principles of sentencing before one can relate the choice of a punitive disposition to the issues of equality and the specific problems faced by visible minorities.

"To sentence a member of a visible minority on the assumption of formal legal equality is to assume that racial discrimination is not causally connected in any way to the accused's criminal behaviour", said Mr. Archibald. This ought to be the norm in the absence of proof that race was a relevant factor in the commission of the offence (such as a racial insult provoking an assault). While race is irrelevant for determining sentence, it may be quite relevant for choosing a sentencing option within the range of those of equivalent severity. Adopting sentencing strategies which are sensitive to racial and cultural differences will increasingly be seen as a measure of the adequacy of the criminal justice system within the context of a multi-cultural society.

Addressing the issue of whether Canadian sentencing policy can proceed from an "affirmative action" foundation, Professor Archibald stated that, "any decision to treat certain visible minorities differently in the sentencing process must be based on the idea that society at large shares in the responsibility for the systemic discrimination which is evidenced in the criminal justice system by such factors as disproportionate incarceration rates". Such sanctions must not, however, contravene the principles of proportionality, equality and restraint. Affirmative action sentencing programs are matters which should properly be addressed by politicians and policy makers (but not by members of the judiciary), because such issues must address the how and why of offering weight to the recognition of social responsibility for crime causation. In Mr. Archibald's view, "In order for an affirmative action sentencing program to validly operate, one might have to demonstrate not only that the visible minority group in question had historically suffered disadvantages, but that these disadvantages are causally related to crimes of certain types and that the sentencing options envisaged by the program will strike at the roots of this causational problem".

Professor Archibald is of the view that egalitarian and ameliorative sentence development will only occur through the cooperative efforts among all who are involved in the criminal justice system: policy makers, Crown and defense counsel, judges, correctional personnel, legal researchers and most importantly, leaders of visible minority communities. While acknowledging that

such policies and programs may help to alleviate some of the causes and effects of systemic discrimination, Professor Archibald stressed that, "judges still occupy the symbolic focal point for demonstrating that justice is seen to be done for visible minorities in Canadian society."

Mr. E. Anthony Ross
Attorney

In responding to Mr. Archibald's paper, Mr. Ross noted that it would have great application in a system with full egalitarian principles. "Visible minorities are not asking to run a red light and say it was green", Mr. Ross said. "They are asking to stand on the same step as whites when they are judged".

Mr. Ross contends that we are living in a society which is not receptive to people of colour. When judges consider appropriate sentences for visible minority offenders, they are bringing equitable principles to bear on a system of social structures which is not equitable. The system is flawed before the accused ever comes before the courts, therefore, the contextual framework in which the accused functioned prior to the intervention of the criminal justice system has already left the accused at a severe disadvantage. The criminal justice system must work towards ensuring people of colour that it is sensitive to the conditions and circumstances which confront them daily. The sentences imposed on visible minorities should take into account those things which may serve to improve the social conditions of the visible minority group. And finally, concerted efforts must be made to involve members of visible minority groups in the administration of criminal justice. Their perception is that the present system is administered by whites, for whites, which increases the fear of disenfranchised people that they may not be treated fairly and equitably within the current structure.

Mr. Rupert Ross
Crown Attorney
Ministry of the
Attorney General, Ontario

"In the 1970's, a group of Mohawk from southern Ontario hosted a sporting tournament to which they invited a group of James Bay Cree. On the Saturday night they prepared a feast. The Mohawk, an agricultural people long before contact with Europeans, had developed a custom of always setting out considerably more food than could ever be eaten. In this way they demonstrated both their wealth and their generosity. The Cree, however, had a different custom. A hunter-gatherer people for whom scarcity was a daily fact of life, their customs involved always eating everything that was set before them. In this way, they demonstrated their respect for the successful hunter and for his generosity. Needless to say, there was a problem when these

two sets of rules came into collision."

Mr. Ross used this example of cultural misunderstanding to illustrate how we interpret what we see in others through eyes which may not appreciate or understand cultural differences. When acts are seen, but their signal-content is misinterpreted, we cannot help but form inaccurate impressions of others, ascribing motivations, attitudes and states of mind which may well be incorrect.

Mr. Ross has extensive experience dealing with northern reserve communities, where deliberately looking another person directly in the eye is considered to be a sign of disrespect. The rule in these communities is that you only look an inferior straight in the eye. "Fortunately, I had not insulted too many people, though only because they knew I was just an ignorant white man who didn't even know how to behave civilly", said Mr. Ross. More unfortunate was the fact that for many years he had been misinterpreting this lack of eye contact on the witness stand. People whom he believed to be deliberately misleading the court, were in fact demonstrating respect for it. Such examples serve to underscore that "cultural competence " is a critical element in the administration of criminal justice.

Many of the communities where Mr. Ross works are remote, isolated and self-contained. Sustained contact with the majority culture did not take place until thirty years ago, and consequently, adherence to the traditional ways of the culture has continued as strong and sustained. Examples of the way in which the criminal justice system has failed to interpret correctly the cultural norms of the northern native people included the following:

- Native people are often described in pre-sentence and other reports as uncommunicative, unresponsive, unable to offer insights into their actions , unwilling to confront their past, and unwilling to explore their feelings towards themselves or their victims. In short, such reports are considered as disfavourable towards the accused. Mr. Ross points out that it is sometimes the process of rehabilitation, and not its goal that the Native people find objectionable, and therefore, the interpretation of their actions is incorrect.

- A cultural norm of the northern Native people is that grief, sorrow and anger should be quickly buried because the expression of these feelings serves to burden the listener. Such feelings should not be indulged privately because to do so results in a diminished capacity to contribute fully to the community; a necessary factor in a hunter-gatherer society. The past is therefore the past, and its negative parts are to be buried with it. Mr. Ross recalled an incident involving a teenage rape victim who refused to testify when her assailant finally came to trial one year after the event. Her reason was simply that he should have paid his penalty by now, and be getting on with his life.

The past was the past.

When the correct cultural interpretations are placed on the actions of others, it is much easier to understand why they do what they do, and why they refuse to do what we expect. "They are not us", said Mr. Ross. "When they refuse to jump into group therapy, to delve into their pasts, to re-create their emotional states and their trains of thought, that refusal stems not from an unwillingness to change things, but from a cultural prohibition against re-living the traumas of the past, and burdening others with their private woes".

Mr. Ross was of the opinion that the justice system can achieve the sentencing goals of specific and general deterrence if we appreciate the appropriate aspects of cultural difference. We must recognize that within the native community the types of sentences used for the attainment of these goals may be very different from those to which we are accustomed. In closing, Mr. Ross stated that we should not be disturbed if, in the end, "the final quantum of sentence varies dramatically from that generally imposed in the rest of Canada. Our task as professionals is not uniformity of quantum, but uniformity of goal attainment."

The Discussion

One member of the audience noted that some judges discriminate against members of the Caucasian race, so we ought not to assume that discrimination is limited to visible minorities.

Another indicated that the most prominent form of discrimination he has witnessed is against the poor, irrespective of their race. In this person's view, this form of discrimination is the most serious and insidious within the criminal justice system.

PANEL THREE

Plea Bargaining

Douglas Hunt
Assistant Deputy Attorney General
Ontario

The practice of plea bargaining has been the subject of intense study in Canada over the past several years. Both the Canadian Sentencing Commission and the Law Reform Commission are in agreement that plea bargaining serves a legitimate purpose within the criminal justice system in Canada. They have separately suggested that a realistic approach to the reform of the process requires the institution of methods that would enhance efficiency, accuracy, visibility and accountability of plea bargaining decisions.

It seems likely that the majority of judges, Crown and defense counsel will endorse the continuance of the practice, although it seems much less likely that there will be similar agreement on the appropriate mechanisms for reform. The Canadian Sentencing Commission is concerned that the present unstructured plea bargaining process has the potential to undermine the relationship that should exist between the seriousness of criminal behaviour and the way in which it is reflected in a criminal offence or sentence. The Commission argues that the objective of achieving an equitable sentence is jeopardized by this informal practice, which is not open to public scrutiny.

The Criminal Code contains no definition of plea bargaining. The term is commonly used to describe a wide variety of activities on the part of persons employed in the justice system, and includes charge bargaining, sentence bargaining and fact bargaining. Given the significant lack of accountability in the present structure, (owing primarily to the low visibility of the process), s. 534(4) of the Criminal Code nonetheless gives the court the ultimate power to ensure that plea discussions are consistent with the proper administration of justice. There is little support for either legislative control or legislative prohibition of plea bargaining among lawyers and members of the judiciary.

The Canadian Sentencing Commission has made recommendations in a number of areas. In view of the fact that victims often feel left out of the criminal justice process, the Commission recommended that provincial and federal Attorneys General develop guidelines which would direct Crown counsel to keep victims fully informed of plea negotiations, and to represent their views. Given that offenders play either an insignificant or a non-

existent role in plea bargaining, the Commission recommends that the sentencing judge shall inquire of the accused whether he/she understands the plea agreement and its implications. Where it is found that such is not the case, the judge should have the discretion to strike the plea or sentence.

The Commission further noted that the charging practices of police were relevant issues. Consequently, the Commission recommends that federal and provincial Attorneys General collaborate in the formulation of standards for police respecting over-charging or inappropriate multiple charging. The Commission made two recommendations to enhance the visibility and accountability of the exercise of prosecutorial discretion; i.e. (1) to establish guidelines restricting and governing the power of Crown counsel, and (2) to formulate and attempt to enforce guidelines respecting the ethics of plea bargaining. With respect to the judiciary, the view of the Commission is that the trial or sentencing judge should never be a participant in the plea bargaining process.

The Law Reform Commission of Canada (L.R.C.C.) has acknowledged that plea bargaining represents a shadowy justice system unto itself that threatens to pervert the criminal justice process, and to diminish public confidence in it. However, like the Canadian Sentencing Commission, the L.R.C.C. does not advocate the abolition of the practice. It does recommend the need for more openness, the need for judicial supervision, ensuring voluntariness of pleas, verifying the accuracy and appropriateness of pleas, requiring equal treatment of accused persons and enforcing plea agreements.

In Ontario, the conduct of Crown counsel with respect to plea discussions is governed by guidelines which are presently under review. These guidelines identify that the paramount consideration in plea bargaining is the administration of justice. Expediency, in the sense of reducing a backlog of work, is not an appropriate reason for accepting a plea to either a lesser offence, or to a lesser number of offences. The guidelines do not formalize the process, but they do give general direction as to how communications with defense counsel ought to proceed. While these guidelines are not considered to be rigid rules, Crown counsel are expected to conduct all plea discussions in their spirit.

Mr. Hunt concluded by stating that the debate on plea bargaining is just beginning in earnest. In his view, it is time for Attorneys General to consider practices and principles guiding the use of plea bargaining in each jurisdiction. He believes that they should prepare guidelines to make the practice more visible to the public.

Ron Grantham
Police Inspector

In responding to Mr. Hunt's paper, Inspector Grantham made it very clear that his sympathies do not lie with the offender, but rather with the victim. For that reason, he is absolutely opposed to plea bargaining as he believes it undermines the integrity of the criminal justice system. An experienced police officer, Inspector Grantham feels that many victims of crime become "lost in the shuffle" during negotiations between the Crown and defense. In his view that successful plea bargains generally result in a lighter, less onerous sentences for accused persons, the criminal justice system is brought into disrepute by the practice.

Duncan Beveridge
Attorney

Mr. Beveridge stated that plea bargaining occurs in all but the most serious criminal cases in Nova Scotia. He agreed with Mr. Hunt's view that judges should not be involved in plea bargaining as it places them in a prosecutorial role.

He considers that plea bargaining is an appropriate mode of resolution for a criminal matter, although he acknowledges that it is an "ethical minefield" for lawyers. There is a need to increase the visibility of the process, as well as to develop clearer parameters within the boundaries in which both Crown and defense shall operate. Mr. Beveridge noted that communication from the court to the public, via the media, regarding such matters as why certain charges are being dropped, is often unclear. He suggests that more comprehensive explanations would improve the understanding of the public and the victim.

Mr. Beveridge was of the view that plea bargaining can benefit all participants, even victims, in the process. According to him, "if appropriate resolution to a criminal matter can be made out of court, that is all to the good."

Mr. Beveridge recommended that the Department of the Attorney General develop guidelines for plea bargaining and that Crown Prosecutors be given the necessary training to permit them to plea bargain effectively.

The Discussion

"If the criminal justice system is a living body, plea bargaining is a cancer", said one delegate. A colleague disagreed by stating that plea bargaining is a necessary and an effective tool of criminal justice.

A third member of the audience noted that, "you don't bargain unless you've got something to bargain with." Some cases are not conducive to plea bargaining, and should proceed by way of trial.

PANEL FOUR

Assessment of the Present Sentencing System and Prisons

Patrick J. Duncan
Attorney

Nova Scotian judges are resorting to incarceration for an increasingly broader spectrum of crimes. Rehabilitation of the offender has been reduced in many cases to the role of mitigating the length of incarceration, not to addressing whether or not incarceration is to be imposed.

There is an increased willingness on the part of the courts to sacrifice the rehabilitation of the offender in order to give effect to the elements of general deterrence and public abhorrence for the criminal act. If a main objective of criminal justice is the protection of the public, we must give more than lip service to the rehabilitation of the offender. Since imprisonment is so prevalent, attention must be given to the prison system as a place of rehabilitation, not just as a warehouse.

There is an appalling lack of knowledge on the part of judges, Prosecutors and defense counsel with respect to the corrections system. Mr. Duncan recommends that persons from all sectors of the criminal justice system should take full advantage of opportunities to become more familiar with correctional facilities and programs. He further recommends an on-going and systematic dissemination of information by corrections officials regarding the existing programs and facilities.

The mentally ill offender is at a great disadvantage within the corrections environment. Persons who are diagnosed as being mentally ill (but not insane within the meaning of Section 16 of the Criminal Code), are routinely placed in correctional facilities where they are a disruptive influence on other offenders. Protective custody inmates (those who want or need segregation), are also disadvantaged because they do not have access to programs which are made available to the general population of the institution. Persons convicted of sex offences may not acquire treatment while they are incarcerated, and once released, they may not have sufficient income to support expensive therapy sessions. Mr. Duncan suggests that if incarceration is mandatory for these offenders, it should be equally mandatory that proper treatment programs and facilities be provided during incarceration and upon release.

The absence of inmate programs in rural correctional centres leaves inmates with little more to do than watching television and engaging in idle conversation. In larger correctional centres, located in urban areas, there is insufficient space to

permit the effective operation of corrections programs. Mr. Duncan stated that if we expect our correctional system to rehabilitate offenders, we must provide sufficient resources.

In closing, Mr. Duncan recommended that mechanisms be established whereby trades training courses could be continued after the term of incarceration is completed. He further suggested that more emphasis should be placed on requiring the incarcerated offender population to participate in meaningful programming activities in order to qualify for parole.

Jim Davidson
Corrections

In responding to Mr. Duncan's paper, Mr. Davidson noted that the courts may well be relying excessively on the sentencing principle of general deterrence. Although acknowledging that Canada has one of the highest rates of incarceration in the Western world, Mr. Davidson was of the view that locking people up is not the best way to protect society. Research conducted by the Correctional Service of Canada concerning the purpose of sentencing suggests that neither deterrence nor incapacitation should themselves serve as guiding principles of sentencing.

Mr. Davidson presented statistics to support his contention that parole decisions are generally good; i.e. 64% of those released on parole do not return to penitentiary in a five year period subsequent to release.

The need for carceral accommodations for mentally ill offenders has outstripped the available spaces. A Regional Treatment Centre for mentally ill offenders is underway in the Dorchester Penitentiary complex at a cost of twenty million dollars. Corrections officials are responding to the increase in the numbers of offenders requiring psychological treatment by employing staff psychologists to serve each parole office.

Mr. Davidson noted that there are special challenges to providing trades training for federal offenders. When assessed upon reception, 70% of them test below the grade eight level, and they are therefore unprepared academically to take up trades training.

In closing, Mr. Davidson announced that the Solicitor General had just approved a Mission Statement for the Correctional Service of Canada, which places emphasis on the provision of programs within institutions and the community as a means of achieving the objective of the "protection of society".

Mr. James Crane
Corrections

Mr. Crane agreed with Mr. Duncan's position with respect to the overuse of incarceration, noting that provincial institutions are at 100% capacity most of the time. Nova Scotia was the last province to take over the ownership and operation of county jails, and the challenge his department has had to face in recent years is the development and standardization of programs and security measures within correctional facilities.

The priorities set by the Department of the Solicitor General are: to ensure that institutions are safe and secure; to establish uniform procedures; to ameliorate union problems and to implement a comprehensive staff training program. Mr. Crane announced that his department will be undertaking the development of a ten year Master Plan in the near future in order to determine the optimum configuration of facilities and programs.

Mr. Crane disagreed with the federal approach to the problems of the mentally ill offender; i.e. the renovation of Dorchester Penitentiary. He announced that the approval of the Provincial Government has been given to develop a program for a forensic psychiatric facility in this province.

Mr. Crane urged that more federal-provincial cooperation should occur with respect to joint planning of facilities and services.

PANEL FIVE

Legislative Developments Relating to Victims

Mr. Martin Herschorn
Crown Attorney
Department of the Attorney General, N.S.

Mr. Herschorn introduced the topic by stating that over the last decade, concern for victims of crime has been a focus of the criminal justice system. This has been prompted by humanitarian concern for the plight of victims, as well as by an acknowledgement that the system is dependent upon the cooperation of victims and witnesses.

The Federal/Provincial Task Force on Justice For Victims of Crime (1983) concluded that the significant question was not "whether the victim should participate in the criminal justice process, but rather, the extent of the participation". Mr. Herschorn stated that this question has largely been answered by the enactment of Bill C-89 entitled An Act to Amend the Criminal Code (Victims of Crime). He introduced his fellow panelists who were asked to comment on specific aspects of the new legislation.

Theresa Clarke
Victims Coordinator

Victim Impact Statements

Ms. Clarke noted that 43 American states now have provision for the inclusion of victim impact statements which are submitted to the court at the time of sentencing, either in the pre-sentence report or as separate statements prepared by the victim or the probation officer.

She outlined the recommendations of the Victims Task Force regarding victim impact statements, and expressed hope that the new legislation will encourage increased use of these reports. Ms. Clarke stated that Manitoba had participated in one of six pilot projects on victim impact statements, funded by Justice Canada.

In Manitoba, these statements are limited to factual information regarding the losses incurred by the victim as a result of the commission of the offence. Opinion as to the sentence which the offender should receive is not included. Medical reports are used to substantiate the information contained in the victim impact statement. Information is gathered immediately following the commission of the offence, as well as immediately prior to the trial or hearing. Thus far, having heard many comments from counsel, (both defense and Crown), and the

judiciary, the experience in Manitoba is that the statements tend not to be vengeful. The statements contain information which is not otherwise available to the court. Such information includes the immediate and on-going mental and physical harm which the victim has suffered as a result of the crime. Ms. Clarke stated that victims were grateful for an opportunity to participate in the process.

Elissa Lieff
Justice Canada

Restitution Provisions

Ms. Leiff indicated that Bill C-89 expands sections 653 and 654 of the Criminal Code in that it removes the onus from the victim to seek redress, while placing the onus on the court to consider restitution, whenever it is appropriate. She stated that this section of the Bill has not been proclaimed as yet, because the jurisdictions wanted to ensure that they had the necessary systems and programs on place to respond to the legislation.

Martin Herschorn

Victim Surcharge Provisions

The surcharge provisions of Bill C-89 reflect the recommendations of the Victims Task Force. It was recognized by Parliament that it was necessary to develop an alternative source of funds in order to finance the provision of enhanced victims services. Mr. Herschorn reviewed the specific sections of the new legislation pertaining to the amount of the surcharge, the "undue hardship" provision, and the uses to which the revenue may be put.

Mr. Herschorn noted that the Attorney General of Nova Scotia had announced the establishment of a Victims of Crime Services Division in July, 1988. Tasks of the Division will include the following:

- the establishment of a victim impact statement program
- the organization of a system to receive and disburse the funds from the surcharge
- the implementation of information systems, and;
- the development of strategies for promoting victim services.

Mr. Herschorn stated that a Victim Services Coordinator would commence employment with the Department of the Attorney General by May 1, 1989.

Theresa Clarke

Victims Services in Manitoba

Ms. Clarke outlined the victims services within the Province of Manitoba. This province has provided services since January, 1987, using funds obtained through a surcharge on provincial statute penalties only. She stated that funds were distributed and administered by a Victims Assistance Committee on the basis of guidelines set forth in a "Declaration of Principles".

Ms. Clark outlined a number of new programs now in the development stage, i.e. court advocacy for domestic assault victims; increased police-based victims programs; and sexual abuse treatment programs.

The Discussion

One member of the audience remarked that there may be a tendency, on the part of the judiciary, to lower the amount of the fine imposed on an offender to allow for the victim fine surcharge, and to guard against imposing undue financial hardship on the offender.

Another delegate remarked that since most offenders tend not to be persons from the higher socio-economic range, he cannot see how increased funds will flow from the victim fine surcharge fund. He cautioned that governments may need to re-assess the anticipated revenue from the surcharge program.

Echoing this view, one defense attorney claimed that as his clients were rarely able to pay their fines, they would be equally unable to pay the surcharge. Accordingly, the victim services program would therefore have to be supported by provincial grants, "through an additional tax on the middle class".

PANEL SIX

Future Initiatives - The Challenge of Change

Vincent del Buono
Justice Canada

It is clear that many Canadians have real fears about violent crime. Surveys have shown that Canadians tend to view the violent crime problem here as being similar to the experience in the U.S. In fact, the rate of violent crime in Canada is about one fifth of the American rate. However, tragic, high profile Canadian incidents tend to feed the perception that crime in this country is at the American level.

The Canadian public tends to under-estimate the severity of maximum sentences. Polls have shown that Canadians believe that the maximum penalty for breaking and entering a dwelling is four years, when actually, it is life imprisonment. Similarly, the perception of Canadians is that over 60% of federal offenders receive parole; when in actual terms, only 33% are paroled. Public understanding is important because credibility and trust must be at the core of efforts to reform the administration of criminal justice. Said Mr. del Buono, "While policy makers and governments must heed public opinion, it is essential to be cautious about acting on the basis of inaccurate public perception ..... the evolution of sound government policy - policy that has broad public support - is dependent on an informed public."

The Canadian Sentencing Commission has stated that there is abundant evidence of disparity in sentencing, and the Standing Committee on Justice and Solicitor General has concluded that unwarranted disparity should be eradicated. For many Canadians, disparity in sentencing is most troubling when it takes the form of the differential treatment of the rich and poor; white and people of colour and rural and urban. Disparity which is evident in the basis for conditional release from penitentiary is also of concern. On a broad level, the Canadian Sentencing Commission concluded that the very existence of parole contributes to the lack of predictability and clarity in sentencing. This can lead to further inequities because different judges approach differently the issues of earned remission and parole in their sentencing.

To a large degree, police, prosecutors, defense attorneys, judges and corrections officials operate in relative isolation. The result is that each component has developed priorities, strategies and unique practices which seem, from an internal perspective, to be the most acceptable course of action.

The over-use of incarceration is seen as being one of the most significant issues in sentencing policy and practice. The Canadian Sentencing Commission accordingly proposes an approach whereby many offences would carry the presumption that a community based sentence would be imposed. This is despite the fact that there is not widespread community support for non-carceral sanctions. Thus, it is becoming increasingly apparent that all components of the criminal justice system must articulate their objectives in order to render more accurate the public perception of the role and purpose of the system, and in order to gain wide public support for the direction the system will take.

The Canadian Sentencing Commission supports shorter average sentences for most crimes, as well as a lesser role for conditional release, such that the amount of time served in custody would be much closer to the actual term of imprisonment imposed by the sentencing judge. Such sentences would be imposed primarily as denunciation for the offence committed, not for treatment and not, in most cases, to separate dangerous people from society.

In August, 1988, the then Ministers of Justice and Solicitor General announced proposals which were to result in reform of sentencing and conditional release. Their agenda includes the release of a public discussion paper to allow Canadians the opportunity to participate in discussions. Public understanding of the system is fundamental to building the support and trust of the community.

Mr. del Buono outlined a number of initiatives to assist in sentence reform: better public education about criminal justice; the development of a broad range of non-carceral sanctions and programs; the revision of penalty structures which more clearly reflect the average sentence and relative seriousness of the offence; and a lessening of reliance on imprisonment for fine default.

Ms. Paula Kingston
Department of the Solicitor General

Ms. Kingston stated that the present system is complex, and she concedes that considerable concern exists with respect to the link between sentence and release. Conditional release is one of the most significant aspects of the correctional system because it affects the amount of time an offender will spend behind the walls of a prison. There are many forms of conditional release: temporary absence, day parole, full parole and mandatory supervision. To add to its complexity, the system of conditional release is administered by thirteen different jurisdictions; by the provincial/territorial authorities, as well as by the federal government.

The public is concerned that sentence and release, (i.e. the courts and the parole boards), work at cross purposes. Many people believe that a sentence of six years should mean six years inside a penitentiary, and that conditional release lessens the full punishment of the sentence. Corrections and Parole Board officials are empowered, within certain legal constraints, to make decisions about where, and under what conditions, a sentence will be served. Nonetheless, public perception persists that these powers constitute a mitigation of what the judge intended by the sentence.

The Correctional Law Review developed a statement of purposes and principles which highlights the importance of conditional release. The three main elements are:

- Carrying out the sentence of the court

- Providing the degree of custody and control necessary to manage the risk presented by the offender

- Ensuring the appropriate societal re-integration of the offender

A number of concerns have been raised by Committees and Commissions which have reviewed the present system of conditional release: e.g. the lack of visibility/accountability of the process; the absence of meaningful legislative guidelines for parole decision-making; the selection of parole board members. In addressing these concerns, the Canadian Sentencing Commission recommended advisory guidelines based on proportionality and culpability. According to Ms. Kingston, the Commission did not adequately examine the purposes of parole, nor the impact that parole abolition would have on prison populations.

In August 1988, the then Solicitor General released a draft Bill which would see increased eligibility periods for parole, and the elimination of earned remission. The Daubney Commission provided support for the recommendations voiced by the Solicitor General.

The Solicitor General must now review the present system of conditional release in light of all of the reports, studies commissions of inquiry and coroner's inquests which have been conducted in recent years. The Solicitor General and his Cabinet colleagues, particularly the Minister of Justice, will be seriously considering the next steps for reform in sentencing and conditional release. It is impossible to say where this process of examination will lead, although it seems reasonable to conclude that it will not result in the abolition of conditional release.

The Discussion

One delegate asked how we can reconcile the apparent increased emphasis on community dispositions when the judiciary appears to be handing down greater numbers of benchmark decisions involving incarceration. Mr. del Buono responded that in this country we appear to use imprisonment as a "default" disposition; i.e. when no other disposition seems appropriate. He stresses that it is important to provide options to incarceration that the judges believe to be effective.

One delegate remarked that we should keep in mind that when offenders are conditionally released from penitentiary, they continue to serve their sentences, albeit in a far different environment. This is an important factor to consider because sometimes severe restrictions continue to be placed on their freedom. "Parole is not the termination of the sentence," he said.

Another member of the audience suggested that one possible way to allay the public fear about parole might be to cause the offender to be brought back before the sentencing judge for a decision regarding release. In so doing, the sentence as imposed by the court would only be altered as to venue, with the consent of the court. Such practices are currently in effect pursuant to the Young Offenders Act.

Another delegate suggested that "federal time" should be changed from the current two years to a sentence of five years.

Speaking in support of "flat sentencing", one delegate stated that judges now feel that they are "accomplices in the fraud promulgated on the public" because offenders are generally released from prison well before their warrant expiry date. It was generally agreed that the parole reforms to be adopted must make the system more publicly defensible.

The Closing

On behalf of the organizing committee and the sponsors, Mr. David Bright thanked the presenters and the audience for their significant and thoughtful discussion on the topic of sentencing. He commented that he personally found the seminar to have been thought provoking and practical, and expressed the hope that subsequent seminars will be conducted in future.

Prepared by:

Brenda E. Taylor
Halifax, N.S.

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SENTENCING NOW AND IN THE FUTURE

Materials prepared for a seminar held in Halifax, Nova Scotia on March 3 & 4, 1989.

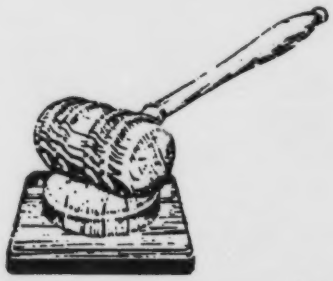
Course Co-ordinators:

His Honour Judge W. C. Atton	- Provincial Court
Judge Robert C. Levy	- Family Court
David J. Bright	- Boyne Clarke
R. Gerald Conrad	- Department of Attorney General
Patrick M. Griffin	- C.L.E. Nova Scotia
D. William MacDonald	- Deputy Attorney General
Kathleen M. Waters	- Department of Solicitor General

Instructors:

His Honour Judge W. C. Atton	- Provincial Court
Bruce Archibald	- Dalhousie Law School
Duncan Beveridge	- Burke, Beveridge
David J. Bright	- Boyne Clarke
Theresa Clarke	- Victims Co-ordinator (Manitoba)
Vincent del Buono	- Department of Justice (Canada)
Jim Davidson	- Correctional Service Canada
William Digby	- Nova Scotia Legal Aid
Patrick Duncan	- Lambert & Duncan
Pamela Flight	- Department of Solicitor General (N.S.)
Inspector Ron Grantham	- Halifax Police Department
Martin Herschorn	- Department of Attorney General
Douglas Hunt	- Assistant Deputy Attorney General (Ontario)
Paula Kingston	- Department of Solicitor General (Canada)
Elissa Lieff	- Department of Justice (Canada)
Adrian Reid	- Crown Prosecutor
E. Anthony Ross	- Crown Prosecutor (Ontario)

SENTENCING NOW AND IN THE FUTURE



Nova Scotia

Sponsored by:
Departments of Attorney General
and Solicitor General

CONFERENCE AGENDA

Friday, March 3, 1989
9:00 A.M.

WELCOME

The Honourable Lorne O. Clarke - Chief Justice of Nova Scotia

OVERVIEW OF CONFERENCE

David J. Bright - Boyne Clarke

SENTENCING PRINCIPLES

His Honour Judge W.C. Atton	-	Provincial Court
William Digby	-	Nova Scotia Legal Aid
Adrian Reid	-	Crown Prosecutor

SENTENCING VISIBLE MINORITIES

- Fairness of Principles
- Process of Sentencing

Bruce Archibald	-	Dalhousie Law School
Rupert Ross	-	Crown Prosecutor (Ont.)
E. Anthony Ross	-	Smith, Gay, Evans & Ross

LUNCHEON
(12:30 P.M.)

2:00 P.M.

PLEA BARGAINING

Douglas Hunt	-	Assistant Deputy Attorney General (Ont.)
Inspector Ron Grantham	-	Halifax Police Department
Duncan Beveridge	-	Burke, Beveridge

ASSESSMENT OF PRESENT SENTENCING SYSTEM AND PRISONS

Pat Duncan	-	Lambert & Duncan
Pamela Flight	-	Dept. Solicitor General (N.S.)
Jim Davidson	-	Correctional Service Canada

BANQUET
(7:00 P.M. FOR 7:45)
SPEAKER - HON. THOMAS J. MCINNIS, ATTORNEY GENERAL
ENTERTAINMENT - BETTY, MAX & MAYNARD

Saturday, March 4, 1989
9:00 A.M.

LEGISLATIVE DEVELOPMENTS RELATING TO VICTIMS

Martin Herschorn	-	Dept. of Attorney General (N.S.)
Elissa Lieff	-	Dept. of Justice (Canada)
Theresa Clarke	-	Victims Co-ordinator (Manitoba)

FUTURE INITIATIVES - THE CHALLENGE OF CHANGE

Vincent del Buono	-	Dept. of Justice (Canada)
Paula Kingston	-	Dept. of Solicitor General (Canada)

PANEL FOR QUESTION PERIOD

The paper presenters will be available for questions from the floor.

CLOSING COMMENTS

David J. Bright - Boyne Clarke

SENTENCING
NOW
AND IN THE
FUTURE

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Chapter 2 Sentencing Visible Minorities

Chapter 3 Plea Bargaining

Chapter 4 Assesment of Present Sentencing System and Prisons

Chapter 5 Legislative Developments Relating to Victims

Chapter 6 Future Initiatives - The Challenge of Change

SENTENCING NOW AND IN THE FUTURE

CHAPTER 1

SENTENCING PRINCIPLES

Material prepared by His Honour Judge W. C. Atton
of the Provincial Court, Halifax, Nova Scotia
March 3 & 4, 1989

SENTENCING

PREFACE

Since appellate review of the fitness of sentences began in 1921, volumes have been filled with case law on sentencing, but by and large the principles that have been established are general in nature and have neither served as a structure for, nor limit upon, the vast discretion bestowed upon the sentencing judge.

The need to achieve uniformity was not traditionally considered to be a valid objective of sentence appeals since our process was modeled on the principle that each sentence should be tailored to suit the individual offender as opposed to the individual offence. This view dominated the jurisprudence until the mid-sixties, when the courts of appeal first recognized that **uniformity of sentence** was a valid objective and that appeal courts could review sentences if there has been marked departure from "sentences customarily imposed in the same jurisdiction for the same or similar crime" **(R. v. Baldhead (1965), 4 C.C.C. 118(Sask.C.A.).**

Although this shift in jurisprudence cleared the path for the development of appellate guidelines and ranges, appeal courts have shown a reluctance to embrace the notion of uniformity for fear that broad general principles will fail to take into account the unique characteristics of each offender (as illustrated by a 1983 decision of the Nova Scotia Court of Appeal in **R. v. Campbell (1983) 10 W.C.B. 490,** "....it is always necessary to make the punishment fit

the criminal rather than the crime").

In the first chapter of **Sentencing in Canada**, Nadin-Davis (1982) reviews the "Philosophical Aims and Practice of Sentencing". Having conducted an exhaustive review of the jurisprudence, he concludes:

> It appears almost customary to preface a discussion of sentencing with an abstract discourse on the philosophy of sentencing, or at least a list of all its aims. An emphasis on what courts do, however, relegates such analysis to the second level of importance, as courts infrequently involve themselves in any real examination of the aims of the sentencing process. Where they do venture into these murky waters, their statements are often misleading and confusing (p.27).

The same conclusion was reached in the studies conducted for the Canadian Sentencing Commission, 1987. A review of over 1,000 sentencing decisions of courts across the country revealed that although general principles of sentencing are discussed in some judgments, there exists no consensus as to either the priority of principles or their meaning. In fact, in a discussion of sentencing principles in the **Canadian Sentencing Handbook (1982)**, the text refers to the importance of "blending" sentencing principles:

> There are no fixed formulas to pre-determine the outcome of blending or balancing the principles as individualized in a given case. By the very nature of the principles themselves the offence must be brought to a focus in a given community at a given time in terms of an all too human drama. As MacKay, J.A. pointed out in **R. v. Willaert (1953), 105 C.C.C. 172 (Ont. C.A.)** the "blend" or the "balance" of the

> various factors will not only vary according to the offence and its nature, but also as to time and place (p.26).

It is not that Courts of Appeal, or trial courts, never state the principles underlying their approach to sentencing, it is that they do it infrequently and when they state these aims, the practice of blending and balancing results more in obscuring their approach than developing a uniform approach to sentencing aims.

To make it more difficult to extract guidance from the jurisprudence, there is a general tendency for Appeal Court judgments to dispose of sentencing matters in a cursory manner. Hence, even when a case provides what appears to be an ideal opportunity to enunciate a general principle to guide a judge as to the type of sanction to impose in particular case, the matter will likely be dealt with in a single sentence (e.g., "...using our best judgment as to what is in the interest of society, we will change the two year sentence to suspended sentence and probation").

When a principle is cited, it is most likely to be "general deterrence". This principle currently provides the most frequently cited justification for the imposition of a custodial term. Judgments will occasionally cite rehabilitation as a rationale but it is used to support a decision not to incarcerate and to justify the imposition of a community sanction to better suit the needs of the individual.

Some courts have complained that the principle of general deterrence to justify a sentence of imprisonment represents the "illogicality of punishing one person for what others might do" (see **R. v. Burnchall (1980), 65 C.C.C. 505).** Many trial court judges complain that higher courts only consider interests of general deterrence in reviewing fitness. Tariff sentencing is evidence that general deterrence is gaining the increasing support of Appeal Courts. As will be discussed below, tariffs are, in essence, a form of minimum sentence that in most cases require the sentencer to impose a term of imprisonment. Although the tariff approach adds some certainty to the process, it is based on a presumption of incarceration that runs contrary to the principle of restraint in the use of custodial sanctions.

As to how a judge's approach to sentencing aims actually affects his or her sentencing practice, a study as reported in **Sentencing (Canada, 1984; 17)** had revealing results:

> A recent study involving "simulated" cases revealed considerable variation among sentences when some 200 judges were asked to assign sentences in the same set of cases. As the study was a simulation, it is of course only suggestive of actual practice. However, the study did show that the differences in sentences were related to the difference of opinion among the judges regarding the appropriate aim of sentencing in each case, the weight to be attached to particular objectives, and the relative importance to be attached to particular facts.

The individual judge's approach to the aims of sentencing thus has far-reaching implications for the sentence he or she will impose. To date, the Courts of Appeal have not issued judgments resulting in any kind of uniformity of approach to the general principles of sentencing in Canada.

SOME GENERAL PRINCIPLES

While the principles of sentencing can be stated simply they are not simple of application nor have they been without change in recent years. To begin with the elementary, every court of appeal in Canada has at one time or another in one form or another acknowledged the principles of deterrence, reformation and retribution referred to by MacKay, J.A. in R. v. **Willaert (1953) 105 CCC 172 at 175 (Ont. C.A.)**:

> "I am respectfully of opinion that there are three principles of criminal justice requiring earnest consideration in the determination of punishment, viz., deterrence, reformation and retribution.
>
> The governing principle of deterrence is, within reason and common sense, that the emotion of fear should be brought into play so that the offender may be made afraid to offend again and also so that others who may have contemplated offending will be restrained by the same controlling emotion. Society must be reasonably assured that the punishment meted out to one will not actually encourage others, and when some form of crime has become widespread the element of deterrence must look more to the restraining of others than to the actual offender before the Court.

> Reformation is the most hopeful element in the question of punishment in most cases, and it is in that direction that the efforts of those concerned with criminal justice will be more and more directed. But reformation, too, has its distinct limitations. It has been found in England that many who have passed through all the stages of binding over to keep the peace, probation, approved school, Borstal institution, and prison, have yet become habitual criminals. They appear to be beyond all human reformative agencies.
>
> The underlying and governing idea in the desire for retribution is in no way an eye for an eye or a tooth for a tooth, but rather that the community is anxious to express its repudiation of the crime committed and to establish and assert the welfare of the community against the evil in its midst. Thus, the infliction of punishment becomes a source of security to all and "is elevated to the first rank of benefits, when it is regarded not as an act of wrath or vengeance against a guilty or unfortunate individual who has given way to mischievous inclinations, but as an indispensable sacrifice to the common safety": see Bentham, Rationale of Punishment, p. 20, quoted at p. 225 of Halsbury loc. cit."

In more recent years the courts appear to have given general endorsement to the principle of protection of society. McDermid, J.A. in **Regina v. Wood (1975) 26 CCC (2d) 100 at 106 (Alta. Sup. Ct. App. Div.)** referred to that principle as follows:

> "The classical and generally accepted reasons given for a sentence of imprisonment are (a) to protect society, (b) to rehabilitate and reform the offender, (c) retribution, (d) to prevent or deter the offender and to deter others from committing a similar crime; see **R. v. Mellstrom (1975), 22 CCC (2d) 472, 29 C.R.N.S. 327, [1975] 3 W.W.R. 385; R. v. Hinch and Salanski, [1968] 3 CCC 39, 2 C.R.N.S. 350, 62 W.W.R. 205 (B.C.C.A.);**

> **R. v. Willaert (1953), 105 CCC 172, [1953] O.R. 282, 16 C.R. 138**; Decore 'Criminal Sentencing: Role of Canadian Courts of Appeal and Concept of Uniformity', **6 Crim. L.Q. 324 at p.333 (1963-64).** Although these reasons are so categorized one shades into the other for retribution in one aspect is deterrence and to reform the offender is the best way of protecting society. In imposing sentence they should all be taken into consideration but, depending upon the crime, the surrounding circumstances and the position of the offender, different weight should be given to each."

McLennan, J.A. in delivering the judgment of the Ontario Court of Appeal in **R.v. Wilmott [1967] 1 CCC 171 at 177**, while acknowledging the importance of deterrence, reformation and retribution, stated:

> The fundamental purpose of any sentence of whatever kind is the protection of society. That this is the real purpose of a sentence cannot be over-emphasized."

Culliton, C.J.S. in **Regina v. Morrissette (1971) 1 CCC (2d) 307 at 309** cites the principles in somewhat different language without expressly suggesting any priority:

> "Both trial and appellate Judges must be ever mindful of the fact that the principle purpose of the criminal process, of which sentencing is an important element, is the protection of society.
>
> From time to time, Courts have reviewed the principles to be considered in the determination of proper sentences. This Court recently did so in **R. v. Kissick (1969), 70 W.W.R. 365.** As has been stated many times, the factors to be considered are:
> (1) punishment;
> (2) deterrence;
> (3) protection of the public; and
> (4) the reformation and rehabilitation of the offender.

> The real problem arises in deciding the factor to be emphasized in a particular case. Of necessity, the circumstances surrounding the commission of an offence differ in each case so that even for the same offence sentences may justifiably show a wide variation."

In Quebec the principles are the same although expressed again in somewhat different terms. Marchand, J.A. in **R. v. Lemire and Gosselin (1948) 92 CCC 201 at 206 (Que. C.A.)** in reference to what constitutes a "fit" sentence for the purposes of review on appeal stated (in translation):

> "It may be said that a sentence has this quality of fitness when it is proportioned to both the objective gravity of the offence and its subjective gravity for the delinquent, and when, in addition it has the necessary qualities of protective exemplariness and curative correction."

In more recent years the principle of protection of the public has also come to the fore in Quebec as is evident from the reasons for judgment given by Greenberg, J. of the Superior Court in **R. v. Johnson (1977) 1 C.R. (3d) S-50** while considering eligibility for parole in a case of murder:

> "In addition to all of the foregoing, the Court has considered the gravity of the offence of second degree murder in the eyes of the law; the subjective gravity of that offence; the criminal record of the accused and his character and reputation; all the attenuating and aggravating circumstances; the possible rehabilitation of the accused; as well as the salutary or exemplary effect of the sentence.
>
> Even if opinions are divided as to the effect of exemplary sentences, it is nonetheless true that the court must assume its responsibility towards society in the application of the punishment which the legislature has provided for the type of

> crime with which we are dealing, so that it will at least be understood by all that the courts will not treat such crimes lightly.
>
> The court has given particular attention to the protection of society, having regard to the high incidence of murders and other crimes of violence in our region, especially the sort of senseless violence as in the present case where a young life was brutally snuffed out in order to rob a leather jacket worth less than $50."

As can be expected in a rapidly changing society the meanings attributed to the various principles as outlined in the following cases suggest that they are in a state of clarification and change.

PROTECTION OF THE PUBLIC - AN OVER-ALL AIM

The Court may speak of protection of society rather than protection of the public, but whichever form this principle takes, it appears to hold primacy over all others today:

> "It has been the practice of this court to give primary consideration to protection of the public, and then to consider whether this primary objective could best be attained by (a) deterrence or (b) reformation and rehabilitation": per **McKinnon, C.J.N.S. in R. v. Grady (1971) 5 N.S.R. (2d) 264 at 266.**

It is fairly clear that sentencing courts see deterrence, reformation and retribution as means of achieving protection of the public:

> "The fundamental purpose of any sentence of whatever kind is the protection of society...

> "For the purpose of protecting society, prevention, deterrence, and reformation should all be considered by a court in imprisonment: per McLennan J.A. in **R. v. Wilmott [1967] 1 CCC 171 at 177-179 (Ont. C.A.).**

O'Hearn, J. in **R. v. Fairn (1973) 12 CCC (2d) 423 at 429 (N.S. Co. Ct.)** comments on "protection of the public" and puts the phrase in helpful perspective:

> "His Lordship's mention of "the public interest" takes for granted that the purpose of the Legislature in enacting criminal law and sanctions is to further the public interest or, as MacKinnon, C.J.N.S., put it in the **Grady case**, the "protection of the public". History indicates that this assumption as to the legislator's purpose is not necessarily true, but in a parliamentary democracy such as Canada, we take it for granted that the Legislature intends to promote the interest of the community, and it is not the function of the Courts to say whether those enactments do actually promote the public interest, or not. The public interest or the interests of the community (a term used by Monnin, J.A. in **R. v. McNicol, (Man.C.A.)** which I personally would favour), require that the protection of the public should take precedence over the welfare of any one individual, including the accused or defendant.
>
> This background indicates that "protection of the public" is not a phrase picked out of the air, but that it is in our constitutional circumstances, an immediate corollary of the obvious primary purpose of criminal sanctions, i.e., the prevention of crime."

Similarly, the British Columbia Court of Appeal in commenting on the objective of prevention of crime pointed out that it is an objective which sentencing courts share with other legal institutions in society and the principle cannot be pursued to the exclusion of other principles:

R. v. Harrison and Garrison [1978] 1 W.W.R. 162 at 164.

INCAPACITATION

"Protection of the public" is sometimes used in the more narrow and functional sense of incapacitation. McLennan, J.A. in **Wilmott [1967] 1 CCC 171 (Ont. C.A.)** used the phrase in this sense at p. 178:

> "Where the sentence is one of imprisonment the protection of society is accomplished in an absolute sense by preventing the offender from repeating his unlawful acts during the term of his imprisonment."

TREATMENT/TRAINING

"Protection of the public" is sometimes used to justify not simply incapacitation, but a period of training, education or treatment in a custodial setting. Yet as in the case of incapacitation, protection of the public when so used runs up against the principle that punishment cannot be more than what is merited by the offence.

PUNISHMENT/RETRIBUTION

While such words such as "punishment" or "retribution" may have an established meaning in philosophy it is equally apparent they have a somewhat different and less attractive connotation in everyday street usage. Since the courts, above all, address their remarks in sentencing to the man on the street, it is not surprising that in more recent years "punishment" and "retribution" are used with sensitivity and qualification in sentencing decisions.

REJECTION OF VENGEANCE

Culliton, C.J.S. in **Morrissette (1970) 1 CCC (2d) 307** states that "punishment had traditionally been considered as encompassing the elements of vengeance and retribution". He goes on to say that it is more realistic to use "punishment" in the sense of "any inhibiting technique" or an "enforced deprivation". Uneasiness with the blurring of the distinction between vengeance and retribution is also reflected in the words of Norris, J.A. in **R. v. Hinch and Salanski [1968] 3 CCC 39 at 43 (B.C.C.A.):**

> "Reference was made before to 'retribution' as being one of the considerations involved in sentencing. I am of the opinion, with respect, that in those cases where the term 'retribution' is used it is loosely equated with the word 'punishment' for I cannot believe that 'vengeance', a common meaning of the term 'retribution' was ever intended. The application of such a meaning involves a loss of that objectivity which is essential to the exercise of the judicial process."

PAYING BACK, RECOMPENSE, REPARATION

On the other hand in **R. v. Fairn (1973) 12 CCC 423 at 437 (N.S. Co. Ct.)** O'Hearn J., points to the importance of retribution not in the sense of vengeance but as a principle of recompense and justice:

> "It is the light in which the public and prisoners alike look at the sanction in determining whether it is just or not. It is, indeed, bound up with notions of doing justice and making recompense and restitution but goes beyond recompense and restitution for actual damages in that the public seek satisfaction over and above these for the wrong done."

PROPORTIONALITY

When speaking of the psychological element of public "satisfaction", however, it is clear that O'Hearn J., is in no way equating the principle of retribution with vengeance, but rather suggesting that retribution is the course of a fundamental limiting principle of proportionality that requires the sentence to be an objective, measured response to the offence in terms of its gravity:

> "It (retribution) is the retrospective element in sentencing and its main function today is to determine the maximum sentence that may be justly imposed upon this particular offender, notwithstanding that deterrence would require a greater one." (Fairn, supra, at p.437).

The same principle of proportionality has been stated in different terms by numerous courts. McLennan, J.A. in **Wilmott [1967] 1 CCC 171 (Ont. C.A.) at p. 178-179**, while rejecting retribution in the sense of revenge acknowledged that every sentence by necessity expresses a "repudiation" by the state of the unlawful conduct. In balancing the elements of prevention, deterrence and reformation in order to arrive at a sentence that would protect society McLennan, J.A. pointed out that there should be a "just proportion" between the crime and the sentence. The Ontario Court of Appeal recently reaffirmed the "fundamental principle that the sentence must not be disproportionate to the gravity of the offence" and the accused must not be simply sentenced to the time required to complete proposed psychiatric treatment

in the interests of protection of the public: **R. v. Boisclair (1980) 4 W.C.B. 89.** In the same view Adamson, C.J.M., in **Regina v. Calder (1956) 114 CCC 155 at 160,** speaking for the Manitoba Court of appeal, quoted the words of Roach, J.A. in **R. v. Warner (1946) 87 CCC 13 (Ont. C.A.):**

> "(Punishment) is the expression of the condemnation by the state of the wrong done to society. There must, therefore, always be a right proportion between the punishment imposed and the gravity of the offence. It is in this sense that it is said that certain crimes "deserve" certain punishments, and not on any theory of retribution."

DENUNCIATION/REPUDIATION

To the extent that retribution is related to the notion of satisfaction as suggested by O'Hearn, J., the courts appear to be moving towards the word "denunciation" and relating it to deterrence. McDermid, J.A. in **Wood (1975) 26 CCC (2d) 100 (Alta. Sup. Ct. App. Div.) at p. 106** stated:

> "As to retribution, I am in agreement with the views expressed by Norris, J.A. in **R. v. Hinch and Salanski, supra, at p. 43 CCC, p. 209 W.W.R.,** that it is no longer an object of sentencing to wreak vengeance on the offender. Retribution as a matter of punishment is really a question of deterrence."

He then went on to consider deterrence and the educative aspect of the sentence in affirming society's rules and expressing public disapproval of the criminal conduct:

> "The denunciatory sentence plays an important part in maintaining the righteousness of society values. The community demands that certain conduct be heavily punished and when the Courts fail to satisfy this demand

> to support core values, the public, in my view, can justifiably complain that the Courts have failed in their duty."

DETERRENCE

The courts clearly distinguish between specific deterrence and general deterrence as illustrated by the words of Culliton, C.J.S. in **Morrissette (1971) 1 CCC (2d) 307 (Sask.C.A.) at p. 310:**

> "Deterrence is also an important factor. The problem is different if the purpose of sentence is to deter the offender from repeating the offence from that if the purpose is to deter others who may be inclined to commit the same offence. In neither case does it necessarily follow that a long sentence is required to achieve the purpose. Deterrence should be considered from an objective view if the purpose is to deter others who may be inclined to commit the same offence. In such case, the gravity of the offence, the incidence of the crime in the community, the harm caused by it either to the individual or to the community and the public attitude toward it are some of the matters to be considered. If the purpose is to deter the offender from repeating the offence, then greater consideration must be given to the individual, his record and attitude, his motivation and his reformation and rehabilitation. If both purposes are to be achieved, then there must be a weighing of all of the factors and a sentence determined that gives a proper balance to each of them."

GENERAL DETERRENCE

In the older cases the courts took the position that general deterrence operated principally through fear: **R. v. Willaert (1953) 105 CCC 172 (Ont. C.A.) at p. 175:**

> "The governing principle of deterrence is, within reason and common sense, that the emotion of fear should be brought into play so that the offender may be made afraid to offend again and also so that others who who may have contemplated offending will be restrained by the same controlling emotion. Society must be reasonably assured that the punishment meted out to one will not actually encourage others, and when some form of crime has become widespread the element of deterrence must look more to the restraining of others than to the actual offender before the Court."

In more recent years the courts appear to be reworking the concept of deterrence and emphasize the educative effects of sanctions. Thus Farris, C.J.B.C. stated for the Court of Appeal in **R. v. Harrison and Garrison [1978] 1 W.W.R. 162 at p. 164:**

> "It is my view that general deterrence is a by-product of the whole system of justice and not necessarily an aim of any particular sentence.
>
> It is the moral sense of the community which substantially achieves the objective of the prevention of crime. As far as the law is concerned, prevention is achieved substantially through the educative effect of all parts of the administration of justice - legislation, prosecution, trial and sentence. Prevention follows from awareness of the system and of the efficiency of its operation. This knowledge guides the behaviour of some by appealing to their reason and sympathy. Others it inhibits more through fear, and in this case is properly spoken of as a deterrent. But every sentence need not have as its object the deterrence of others. The effectiveness of the principle of general deterrence (such as it is) is not diminished by refusing to imprison a person who should not be imprisoned."

PUBLIC CONFIDENCE IN THE ADMINISTRATION OF JUSTICE

Another aspect of general deterrence relates again to public expectations and public perceptions. As Culliton, C.J.S. pointed out in **Morrissette, supra, at p. 311,** sentencing must be "consonant with public confidence in the effective enforcement of the criminal law", and it is for this reason among others th at general deterrence requires the judge to take note of the gravity of the offence, its incidence in the community and the public attitude towards it. Needless to say, other factors must be considered for other reasons but the relationship between the principle of general deterrence and respect to the administration of justice cannot be overlooked.

This aspect of general deterrence may come to the fore where a crime is particularly prevalent or where the law appears to be broken with impunity. In referring to this situation, Tysoe, J.A. speaking for the British Columbia Court of Appeal in R. v. **Adelman [1968] 3 CCC 311 at 314 stated:**

> "There is a minority of our people who will observe the laws of this country which they do not like only if they are convinced that offenders will be punished quickly and severely for their crimes. There is some danger that the Courts may so often impose light or suspended sentences for serious crimes in the hope of rehabilitating the offenders that the sanctions against crime are greatly weakened and become ineffective because the penalty for crime becomes too cheap. In many cases punishment must be

> imposed to deter others and to maintain effective sanctions against crime."

The role of deterrence in maintaining general credibility of the law has been commented upon by others:

> "Where deterrence alone is in issue, there is not much question but that general deterrence must take precedence over individual deterrence, if only to maintain the credibility of the law. This point was made by Mr. Justice Holmes in the first passage previously quoted: "The law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them. If you persist in doing them, it has to inflict the pains in order that its threats may continue to be believed". He put it even more succinctly in the expression, 'The law must keep its promises'": Ohearn, J. in **R. v. Fairn, (1973) 12 CCC (2d) 429 at p. 432, citing R. v. Derksen (1972) 9 CCC (2d) 97 (Ostler, P.C.J.).**

SPECIFIC DETERRENCE

A severe sentence may sometimes be imposed in order to teach the offender a lesson particularly in cases where he has failed to respond on previous occasions to more lenient sentences. Thus a short jail term may be imposed where, otherwise, the accused might have been sentenced to suspended sentence and probation or a stiff fine. As outlined earlier, Culliton, C.J.S. in **R. v. Morrissette (1970) 1 CCC (2d) 307 at p. 310** stated:

> "If the purpose is to deter the offender from repeating the offence, then greater consideration must be given to the individual, his record and attitude, his motivation and his reformation and rehabilitation."

REHABILITATION/REFORMATION

MacKay, J.A. in **R. v. Willaert (1953) 105 CCC (2d) 172 (Ont. C.A.) at p. 176** spoke of rehabilitation in the sense of reformation through education and training:

> "The tendency in recent years has been to impose more moderate sentences. At one time it was commonly assumed that the only purpose of punishment was to punish, but today its function is conceived in very different terms. It may be to try to reclaim the offender for society, to induce and stimulate habits of regularity and reliability even to compensate partially for an education that ended prematurely, and generally to try to awaken in the mind of the vicious and irresponsible a sense of the obligations of life and citizenship. Such moderation in sentence may not be warranted in the case of confirmed criminals but in that of the first offender an effort at reclamation is surely the part of wisdom and prudence in judicial discretion."

TREATMENT

Brooke, J.A. speaking for the Ontario Court of Appeal in **R. v. Wallace (1973) 11 CCC (2d) 95 at 100** in reducing a sentence of eight years and two years consecutive on charges of robbery and assault to four years referred to the psychiatric aspects of the case and stated:

> "If the primary object of the criminal law is the protection of society, how apt is this sentence? Perhaps such a sentence as this one offers immediate protection to society but clearly it does little to protect it for the future. The best future protection for society lies in imposing a sentence which will make the appellant's rehabilitation probable through the provision of medical treatment that can be made available to him. It seems then that if a

> moderate term of imprisonment had been imposed, the medical treatment which he needed would have been available during such term and the sentence must be altered so that we can accomplish his cure and protect the community."

The rehabilitative principle, as pointed out above is linked to a policy of moderation of punishment and not even the need for prolonged medical treatment can convert the rehabilitative principle to a preventive function: **R. v. Heck (1963) 40 C.R. 142 (B.C.C.A.); R. v. Wilmott [1967] 1 CCC 171 (Ont. C.A.).** As indicated earlier in the discussion of protection of the public, undue reliance on prevention or treatment runs afoul the principle of proportionality.

SUMMARY

It would seem, therefore, that the generally accepted principles of sentencing are (a) the protection of society, (b) the rehabilitation of the offender, (c) some degree of retribution or punishment and (d) specific deterrence of the offender and general deterrence of other possible offenders.

Legislative opinion as reflected in minimum and maximum sentences set out in the Criminal Code and judicial opinion as expressed in the many cases would appear to be, to say the least, varied, and I look forward to any conclusions which may result from this meeting.

I would like to assure you that I take no credit for original research in the material that I have compiled in this short paper. It has been gleaned mainly from the Report of the Canadian Sentencing Commission - **Sentencing Reform, a Canadian Approach,** and the **Canadian Sentencing Handbook,** produced by the Canadian Association of Provincial Court Judges.

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SENTENCING
NOW
AND IN THE
FUTURE

CHAPTER 2

SENTENCING AND VISIBLE MINORITIES: EQUALITY AND AFFIRMATIVE ACTION IN THE CRIMINAL JUSTICE SYSTEM

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Sentencing and Visible Minorities:

Equality and Affirmative Action in the Criminal Justice System

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"Sentencing and Visible Minorities:

Equality and Affirmative Action in the Criminal Justice System"

Introduction:

The Canadian criminal justice system is facing serious criticism for being racist.[1] Certain Canadian laws[2] and judicial decisions[3] in the past have made the legal system an easy target for such charges. Canadian governments have acknowledged the problems of racism in Canadian society[4], and provincial and federal human rights legislation exemplify efforts to eradicate racial discrimination.[5] However, racial discrimination persists in Canadian society and the criminal justice system occupies a particularly sensitive place in controversies over the role of the state in these problems.[6] Moreover, the

[1] For a discussion of what may be meant by a racially defined ethnic group, see E. Kallen, Ethnicity and Human Rights in Canada (1982), pp. 62-63.

[2] For example, see the British Columbia Coal Mines Regulation Act, S.B.C. 1888, c.84, as amended S.B.C. 1890, c.33 prohibiting employment of "Chinamen" which became the subject of dispute in Union Colliery Co. of British Columbia Ltd. v. Bryden, [1899] A.C. 580 or the Saskatchewan statute prohibiting the employment of white women by Chinese businessmen which was upheld in Quong Wing v. The King (1914), 49 S.C.R. 440.

[3] For example see Christie v. York Corp., [1940] S.C.R. 139 which upheld the "right" of a tavern owner in Montreal to exclude black patrons; or Noble v. Alley, [1949] 4 D.L.R. 375 (Ont. C.A.) where the court upheld a trial decision confirming the right of a property owner to place a covenant in a deed prohibiting sale to any person of the "Jewish, Hebrew, Semitic, Negro or coloured race or blood" (overturned [1951] S.C.R. 64 on grounds not related to the discriminatory nature of the covenant).

[4] See Minister of State and Multiculturalism, Race Relations and the Law, Ministry of Supply and Services, Ottawa, 1983 at pp. 11-20.

[5] See the main Canadian text W. Tarnopolsky, Discrimination and the Law in Canada (1982), passim.

[6] Allegations of racism by police have recently emerged in Montreal and Toronto. The Royal Commission on the Prosecution of Donald Marshall, Jr. has commissioned two studies on racial discrimination in the justice system in the Province of Nova Scotia (one devoted to blacks, the other to Micmacs) which will be published shortly.

equality provisions in the Canadian Charter of Rights and Freedoms have quite properly raised expectations that legislatures, courts and policy makers can and must use legal mechanisms to counter racial discrimination wherever it exists, but particularly in the criminal justice system.[7]

The purpose of this paper is to explore certain problems and solutions regarding racial discrimination in the processes of sentencing and the administration of criminal sanctions. In adopting this focus one must be ever mindful that sentencing judges have no real choice in determining which cases will come before them.[8] Judges have virtually no control over patterns of crime causation,[9] nor are they able to greatly influence the patterns of police behavior which will determine how police resources are used to detect crime or apprehend suspects.[10] Thus, if racism in society at large or in policing practices brings before the court a disproportionate number of visible minority

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[7]See Raj Anand, "Ethnic Equality", in A.F. Bayefsky and M. Eberts, Equality Rights and the Canadian Charter of Rights and Freedoms, Carswell, Toronto, 1985, pp. 81-130. Also: Rainer Knopff, "Prohibiting Systemic Discrimination: Policy Development or Discontinuity?" (1985-86), 50 Sask. L. Rev. 121; and Ian Savage, "Systemic Discrimination and Section 15 of the Charter" (1985-86), 50 Sask. L. Rev. 141.

[8]Some control by courts of abuse of their process is recognized. See for example R v. Jewitt (1985), 21 C.C.C. (3d) 7 (S.C.C.). However, these cases will never amount to a wholesale judicial assertion of the right to control the docket. Prosecutorial discretion will no doubt continue to be a primary factor in the administration of criminal justice. See Bruce P. Archibald, Prosecuting Officers and the Administration of Criminal Justice in Nova Scotia, Research Study of the Royal Commission on the Prosecution of Donald Marshall Junior, Halifax, forthcoming, passim. Also Phillip C. Stenning, Appearing for the Crown,

[9]The inconclusive nature of the effect of sentencing decisions on general deterrence is discussed in F.D. Cousineau, Legal Sanctions and Deterrence, a Research Report of the Canadian Sentencing Commission, Dept. of Justice, Ottawa, 1988.

[10]Judicial decisions concerning allegations of police misconduct, whether in the context of civil or criminal proceedings, might arguably have such an effect. However, such proceedings are so rare that their impact is of no general concern here.

offenders,[11] sentencing judges cannot be "blamed." On the other hand, the criminal trial and the process of sentencing in particular are a symbol and an embodiment of the principles of justice (or injustice, as the case may be) in Canadian society. As such, it is essential to ensure at the very least that the methods by which offenders are sentenced and sanctioned do not promote or exhibit characteristics of racial discrimination. Wherever possible in accordance with principles of justice the sentencing and correctional processes must also be actively directed toward the elimination of racial discrimination. This paper is intended to assess how these two objectives--egalitarian sentencing and ameliorative sentencing--can be achieved.

In order to do this, the evidence of racial discrimination in the Canadian criminal justice system and the perceptions of racial bias in sentencing must be examined. Next, it is essential to look at the disparate purposes of the criminal sanction, the principles governing sentencing and the range of sentencing options, to gain a sense of the limitations and the potential of criminal sentencing in reducing racial discrimination. There subsequently follows an analysis of how choices can be made among sentencing options in the interests of equality and affirmative action to ensure justice for offenders from visible minorities which have historically suffered from racial discrimination. Finally, the paper attempts to identify tasks and allocate responsibilities for various players in the criminal justice system with a view to reducing systemic discrimination via the sentencing process. Given the enormous importance of the endeavour, it is hoped that readers will pardon the presumptuousness of attempting such a difficult undertaking in such brief compass.

[11]Evidence for the existence of such phenomena will be discussed below.

I Racial Discrimination in the Criminal Justice System

Disputes over whether racial discrimination exists in the criminal justice system, or the extent to which it exists, are often related to what is meant by the term "discrimination". It is not merely, then, a pedantic exercise to begin this section with a discussion of how discrimination has been defined and the concept recently applied by the Supreme Court of Canada in relation to the equality guarantees of the Charter. This section will then turn to the evidence available which demonstrates systemic discrimination in the criminal justice system as a whole, before considering the problems in any effort to scientifically demonstrate the existence of racial discrimination in the sentencing patterns of the judiciary. Conclusions are then drawn as to the problems which the evidence poses in relation to sentencing policy and visible minorities.

A. Systemic Discrimination Defined

It is now widely accepted in Canada that racial discrimination is understood to exist even where individuals involved in the discriminatory behavior do not directly intend that their actions have an adverse effect on the individuals or groups so harmed.[12] This principle is the basis for recognizing remedies against discrimination in a variety of legal contexts has been adopted recently by the Supreme Court of Canada. Dickson, C.J. has stated:

> "Discrimination . . . means practices or attitudes that have, whether by design or impact, the effect of limiting an individual or a group's right to the opportunities generally available because of attributed rather than actual characteristics . . . it is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the by-product

[12]See Kallen, supra, footnote 1; Race Relations and the Law, supra, footnote 4; and Tarnopolsky, supra, footnote 15. See also the Report of the Royal Commission on Equality in Employment, (The Abella Report), Ministry of Supply and Services, Ottawa, 1984, pp. 7-10.

> of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices which led to this adverse impact may be discriminatory."[13]

This approach means that Canadian courts will increasingly be called upon to determine whether discrimination exists based on evidence of social patterns or legal practices demonstrating disproportionate "adverse impacts" or "systemic discrimination" based on race where proof of intentional bias is impossible.[14]

This concept of adverse effects or systemic discrimination has been used by the Supreme Court of Canada for the purpose of defining equality rights in section 15 of the Canadian Charter of Rights and Freedoms.[15] Charter section 15(1) provides, in part: "Every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination."[16] In other words, section 15 of the Charter is designed to prevent and prohibit discriminatory practices which purport to have the force of

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[13] Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114 (known as the "action travail des femmes case") at pp. 1138 and 1139. See also: Re Bhinder and C.N.R. Co., [1985] 2 S.C.R. 561; Re Ontario Human Rights Commission et al. and Simpson Sears Ltd. (1985), 23 D.L.R. (4th) 321 (S.C.C.); Robichaud et al. v. The Queen (1987), 40 D.L.R. (4th) 577 (S.C.C.).

[14] For a full discussion see Beatrice Vizkelety, Proving Discrimination in Canada, Carswell, Toronto, 1987, passim.

[15] being Part I of the Constitution Act, 1982, enacted by the Canada Act 1982 (U.K.) c.11, proclaimed in force April 17, 1982, as amended by the Constitution Amendment Proclamation, 1983, S.I./84-102, effective June 21, 1984; hereinafter cited simply as "the Charter".

[16] For helpful analyses of the meaning of this provision see: Anne F. Bayefsky, "Defining Equality Rights", in Bayefsky and Eberts, supra, footnote 7, at p. 1, and A. Wayne MacKay, "The Equality Provisions of the Charter and Education: A Structural Analysis", (1986) 11 Can. J. of Education 293. A more broad ranging series of articles on the potential impact of section 15 can be found in Christine L.M. Boyle, A. Wayne MacKay, Edward J. McBride and John A. Yogis, Charterwatch: Reflections on Equality, Carswell, Toronto, 1986, passim.

law.[17] McIntyre, J., in a passage which gained the approval of the whole court, interpreted the meaning of the word discrimination in Charter section 15 in the following manner:

> " . . . discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."[18]

The sentencing provisions of the Criminal Code,[19] the common law principles of sentencing,[20] and the decisions of sentencing judges[21] make no overt distinctions

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[17]Section 52(1) of the Constitution Act, 1982, reads: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

[18]Andrews v. The Law Society of British Columbia, Supreme Court of Canada, February 2, 1989, unreported, in which provisions restricting admission to the legal profession in British Columbia to Canadian citizens were struck down as contrary to Charter section 15. McIntyre, J. dissented as to the result, but the other justices adopted his approach to the interpretation and application of Charter section 15.

[19]The Criminal Code, R.S.C. 1985, c.C-46, ss. 716-761, hereafter cited as "Criminal Code".

[20]The difficulties caused by the absence of statutory principles of sentencing are discussed, infra, in text corresponding to footnotes 44 to 50. For standard texts describing the common law principles by which Canadian sentencing judges attempt to rationalize the exercise of their broad sentencing discretion see R.P. Nadin-Davis, Sentencing in Canada, Carswell, Toronto, 1982; and Clayton C. Ruby, Sentencing, (3rd ed.), Butterworths, Toronto, 1987.

[21]Intentional and express discrimination against any person on the basis of prohibited classes of distinction would clearly be grounds for appeal. Moreover, such discrimination would undoubtedly form the basis for complaint against that judge before the appropriate Judicial Council, with the likely recommendation for dismissal. Since such overt discrimination is rare, and carries particular remedies, this paper is primarily concerned with the more difficult problems of unintended or covert systemic discrimination and its relationship to sentencing. For certain rare "affirmative action" considerations by judges, see text and law

based on race or personal characteristics which are explicitly attributed to accused persons on the basis of being a member of a visible minority group. In this regard sentencing law or the sentencing process can be described as "neutral on its face", or premised on notions of "formal legal equality" among accused persons. It is the purpose of this part of the paper to explore the extent to which the sentencing process is, or is perceived to be, discriminatory in the sense of being characterized by "adverse effects or discrimination" or "systemic discrimination" in relation to visible minorities.

B. The Problematic Evidence of Adverse Effects Discrimination in Sentencing

The charge is often made that "equality before the law is a social fiction."[22] Indeed, the facts in Canada present some startling evidence to this effect. It is a well documented fact that visible minorities are over represented in Canadian prisons by comparison to their proportion in the population as a whole.[23] For example, aboriginal peoples form 2% of the Canadian population, but 10% of the offenders in federal prisons.[24] However, this disproportionate representation of visible minorities in prison populations is not, in and of itself, evidence of racial discrimination in sentencing. It is evidence of a pattern which may demonstrate adverse effects discrimination in the criminal justice system as a whole, or in the way in which that system applies to a racist society. However, it is not evidence, per se, of racial bias in

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cited, infra, at footnote 161.

[22]For example, see Thorsten Sellin, "Race Prejudice in the Administration of Justice" (1935), 41 Am. J. Sociology 212 at p. 217.

[23]See Knopff, supra, footnote 7; and Savage, supra, footnote 7.

[24]Ole Instrup, Chairman, National Parole Board, "Chairman's Presentation to the Standing Committee on Justice and the Solicitor-General", Ottawa, December, 1987 at p. 23.

judicial decision making.[25] Reasons for this disproportionate number of visible minorities in Canadian prisons may lie in differential crime rates across races,[26] variations in deployment of police resources in relation to certain types of crimes,[27] discrimination in public reporting of crimes,[28] discrimination in police arrest practices,[29] discrimination in charging practices on the part of Crown prosecutors, differential request rates for parole,[30] or discrimination on the part of parole authorities, to name only some of the logical possibilities.

Regardless of the fact that racial imbalances in prison populations may be the result of systemic discrimination from many sources, the view is widely held that there is racial discrimination in sentencing itself. The well known criminologist Richard Quinney asserts:

> "Obviously judicial decisions are not made uniformly. Decisions are made according to a host of extra-legal factors, including the age of the offender, his race and social class. Perhaps the most obvious example of judicial

[25]For a useful brief discussion of the relationship between possible discrimination in various aspects of the criminal justice process and sentencing, see Alfred Blumstein, Jacqueline Cohen, Susan E. Martin and Michael Tonry (eds.), Research on Sentencing: The Search for Reform National Academy Press, Washington, 1983, pp. 13-16.

[26]There is evidence to suggest that for reasons related to special and economic discrimination in society at large, blacks in the U.S. do commit certain crimes more frequently than whites. See M.J. Hindelang, "Equality Under the Law", (1969) J. of Crim. L., Criminology and Police Sci 306-313.

[27]For the classic Canadian discussions of the way in which deployment of police resources "creates" crime, see Richard V. Ericson, Making Crime: A Study of Police Detective Work, Butterworths, Toronto, 1981, passim; and R. Ericson, Reproducing Order: A Study of Police Patrol Work, U. of T. Press, Toronto, 1982, passim.

[28]The most recent study on public perception of crime was undertaken by the federal government

[29]See R.M. Bienvenue and A.H. Latif, "Arrests, Disposition and Recidivism: A Comparison of Indians and Non-Whites" (1971), 16 Can. J. Criminology and Corrections 1.

[30]There is some Canadian evidence, for example, that native prisoners are less likely to make application for early parole release than other inmates.

> discretion [sic] occurs in the handling of persons from minority groups. Negroes, in comparison to whites, are convicted with lesser evidence and sentenced to more severe punishments."[31]

Early social science studies of sentencing conducted in the United States supported this view,[32] particularly in relation to the imposition of the death penalty in the southern states.[33] Indeed, recent American data confirms that the renewed use of the death penalty falls with unequal incidence on blacks and whites, especially when the race of the victim is taken into account.[34]

Despite these widely held impressions, the greater weight of the modern sociological literature indicates that many of the earlier studies were methodologically flawed, sometimes merely correlating race, offence and sentencing outcomes.[35] The majority of modern studies which take into account a series of variables, such as seriousness of the offence, number of offences, degree of harm caused to a victim, use or non-use of a weapon, employment status, prior criminal record, dependence on alcohol or drugs, and so on, are finding that there is not a statistically significant relationship between race of the

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[31] Richard Quinney, The Social Reality of Crime, (1970), pp. 141-142.

[32] See for example: Thorsten Sellin, "The Negro Criminal: A Statistical Note" (1928), 52 Annals Am. Academy of Pol. and Soc. Sci. 140;

[33] E.H. Johnson, "Selective Factors in Capital Punishment" (1957), 36 Social Forces 165.

[34] Samuel Gross and Robert Mauro, "Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization" (1984), 37 Stan. L. Rev. 27; and Anthony G. Amsterdam, "Race and The Death Penalty" (1988), 7 Criminal Justice Ethics 2.

[35] The most complete attempts to survey and assess the literature are: J. Hagen, "Extra-legal Attributes and Criminal Sentencing: An Assessment of the Sociological Point of View" (1974), 8 Law and Soc. Rev. 357-383; G. Kleck, "Racial Discrimination in Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty" (1981), Amer. Soc. Rev. 783-805; and J. Hagen and K. Bumiller, "Making Sense of Sentencing: A Review and Critique of Sentencing Research," in Blumstein et al. Research on Sentencing, supra, footnote 25, Vol. II, pp. 1-51.

accused per se and sentencing outcome. Most studies state that evidence of racial discrimination in sentencing is at most indirect or that sentencing outcomes are predicted by legally relevant factors.[36] The most comprehensive American study concludes:

> "The available research suggests that factors other than racial discrimination in sentencing account for most of the disproportionate representation of blacks in U.S. prisons, although racial discrimination may play a more important role in some regions or jurisdictions, for some crime types, or in the decisions of individual participants.[37]

At least one Canadian statistical study supports such a conclusion,[38] and it would not be surprising if the research undertaken by the Marshall Inquiry disclosed the same results.

Statistical studies, of course, may mask the appearance of discriminatory actions which have the effect of cancelling one another out in the general results. For example, one U.S. study conducted in Georgia found that "blacks are the victims of discrimination by some judges, but the beneficiaries of discrimination by others."[39] Hence the difficulty of relying on statistical data showing no systematic racial bias in sentencing at the aggregate level. Furthermore, some "legally relevant" factors in sentencing may have obviously discriminatory effects in practice. For example, in considering whether an

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[36]For example, see Susan Welch, John Gruhl and Cassia Spohn, "The Influence of Alternative Measures of Prior Record" (1984), 22 Criminology 215-227.

[37]Blumstein, et al. Research on Sentencing, supra, footnote 25, Vol. I, at p. 13. In agreement, see Marjorie S. Zatz, "Race, Ethnicity and Determinate Sentencing" (1984), 22 Criminology 147-171.

[38]Marek Debicki, "Sentencing and Socio-Economic Status," in Dale Gibson and Janet K. Baldwin, Law in a Cynical Society? Opinion and Law in the 1980's, Carswell, Calgary, 1985, pp. 219-235. For a British study with similar results see Michael McConville and John Baldwin, "The Influence of Race on Sentencing in England", [1982] Crim. L. Rev. 652-658.

[39]J.L. Gibson, "Race as a Determinant of Criminal Sentences: A Methodological Critique and a Case Study" (1978), 12 Law and Soc. Rev. 455-478.

accused is an appropriate candidate for a rehabilitative programme or a less punitive sanctioning option, reference is often made to the accused's employment status and employment record.[40] Higher rates of unemployment among visible minority groups under such circumstances will lead to disparate sentencing results, but an analysis of comparative sentencing data will ascribe the outcome to employment status and not racial discrimination in sentencing.[41] Some American jurisdictions have found the correlation between employment status and race so potentially damaging to visible minority groups that they have prohibited reference to employment record in the sentencing process.[42] This issue, of course, demonstrates how a sentencing process which may be neutral and impartial on its face can contribute to and perpetuate systemic discrimination which has its roots in the social and economic systems of society at large.

C. A Sentencing Response to Perceived and Actual Systemic Discrimination

At least one expert on sentencing research has decried the unwillingness of researchers and the public to admit the fact that there is little evidence of systematic racial discrimination in sentencing when research controls for legally relevant aggravating and mitigating factors.[43] But there is a widespread

[40]Standard Canadian sentencing texts assume that reference to employment status and record will be made. See for example, Ruby, supra, footnote 20, at p. 183.

[41]For a recent review of the American literature on the topic see Bradford C. Mank, "The Role of Employment Factors in Sentencing" (1988), Criminal Law Bulletin 249-253. Data on employment rates of visible minorities in Canada is found in The Abella Report, supra, footnote 12, at pp. 79-99.

[42]Minnesota has done so in its sentencing guidelines: Minn. Stat. Ann. 244.09 Comment II.D.03(1) (West Supp. 1987); as has Congress in relation to the United States Sentencing Commission: U.S.C.A. 994(d) and (e) (West Supp. 1987).

[43]G. Kleck, "Life Support for Ailing Hypotheses: Modes of Summarizing the Evidence for Racial Discrimination in Sentencing" (1985), 9 Law and Human Behavior 271-285. Kleck argues that the class nature of the offender's crime has more to do with racially disproportionate prison populations than race per se.

perception among members of visible minority groups, which is unlikely to disappear, that judges are racially biased in the exercise of their sentencing discretion which is unlikely to disappear. These perceptions may be accurate to the extent that they are based on individual instances of racial discrimination which are not caught through statistical studies. At the very least they demonstrate that the sentencing process suffers from a credibility problem--justice is not being seen to be done. More importantly sentencing judges are caught in a legal system reinforcing a social and economic order which draws visible minorities into its clutches in disproportionate numbers. Using currently approved, legally relevant criteria, judges may be forced to sentence disproportionate numbers of visible minority offenders to prison in the name of formal equality.

There are thus two factual conclusions to be drawn which cry out to be addressed in the sentencing process. First, there appears to be systemic discrimination in the justice system as a whole, whether or not related to sentencing, which has the effect of putting larger numbers of visible minority offenders in prisons than their numbers in society at large would warrant. Secondly, there is a widespread perception that there is racial discrimination in sentencing itself, whether or not this is actually the case. Before discussing how the sentencing process might address these problems, it is necessary to assess critically the purposes, principles and options which presently structure sentencing discretion in our criminal justice system.

II The Sentencing Process: Purposes, Principles and Options

Perceptions of racial discrimination in sentencing may in some measure be a reflection of the public's general concern over sentencing disparity in Canada. The Canadian Sentencing Commission has collected data which indicates that there is a widespread belief among both Crown and defence counsel across Canada that

unwarranted disparity in sentencing exists.[44] Moreover, research into judicial attitudes[45] and statistical analyses of sentencing practices in various parts of Canada[46] support the view that there are wide differences in outcomes in relation to essentially similar cases. As Hogarth has indicated, some sentencing disparity may be related to judicial differences as to the appropriate purposes or principles which ought to govern the sentencing process.[47] Thus judges who think deterrence is the over-riding consideration in a particular case seem more likely to hand down a harsher sentence than judges who believe the interests of rehabilitating the offender ought to predominate. This uncertainty concerning basic purposes and principles of sentencing, when combined with the broad sentencing discretion given to judges within the maximum allowable penalty for a given offence, has implications for solving actual and perceived problems of racial discrimination in sentencing.

If order is to be brought to the sentencing process, it is useful to

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[44]The Report of the Canadian Sentencing Commission, Sentencing Reform: A Canadian Approach, Ministry of Supply and Services of Canada, Ottawa, 1987 states at p. 74: " . . . approximately 93% of defence and 92% of Crown counsel were of the opinion that there was at least some unwarranted variation in sentences in their own unwarranted variation in sentences in their own jurisdiction . . . Forty percent of defence counsel and 41% of Crown counsel thought that there was a "great deal of unwarranted variation" in sentences handed down across Canada.

[45]John Hogarth, Sentencing as a Human Process U. of Toronto Press, Toronto, 1971, passim, and T.S. Palys and S. Divorski, "Judicial Decision-Making: An Examination of Sentencing Disparity Among Canadian Provincial Court Judges", in D.C. Muller, P.E. Blackmun, and A.J. Chapman (eds.), Psychology and the Law John Wiley and Sons, Toronto, 1984.

[46]S.K. Jaffary, Sentencing of Adults in Canada, U. of T. Press, Toronto, 1965; K.R. Jobson, (1971) 4 Ottawa L. Rev. 421-457; L. MacDonald, "Crime and Punishment in Canada: A Statistical Test of the 'Conventional Wisdom'" (1969), 6 Can. Rev. of Soc. and Anthro 212-236. From government sources, see: Dept. of Justice of Canada, Sentencing, Ministry of Supply and Services, Ottawa, 1984; and Solicitor General of Canada, Long Term Imprisonment in Canada, Ministry of Supply and Services, Ottawa, 1984 as well as studies cited in the Canadian Sentencing Commission Report, supra, note 44, at p. 76.

[47]Hogarth, supra, footnote 45.

distinguish between the purposes of the criminal sanction and principles of sentencing which govern the imposition of such sanctions. When this distinction is clarified, the basis for choosing particular sentencing options can be related to issues of equality and the particular problems faced by visible minorities.

A. The Purposes of the Criminal Sanction

The litany of purposes of the criminal sanction is familiar to anyone seriously involved with the criminal justice system. The over-arching purpose of the criminal sanction is sometimes said to be the "protection of the public".[48] As has been pointed out by others,[49] this purpose is one which is shared with other components of the criminal justice system such as police forces or the correctional system. Thus it is not terribly helpful as an analytical tool for the understanding of sentencing, although it does emphasize the primarily public aspect of criminal law as opposed to the predominantly private character of civil law which is directed to compensation of losses suffered by persons (whether natural or juristic).[50]

(1) Retribution

The most important purpose of the criminal sanction in the eyes of most members of the public and those of many jurists, and certainly a most important

[48]See R v. Grady (1974), 10 N.S.R. (2d) 90 (N.S.S.C., App. Div.).

[49]Andrew Ashworth, "Criminal Justice and Deserved Sentences", a paper presented to the Conference of the Society for the Reform of the Criminal Law, "Reform of Sentencing Parole and Early Release", August 1-4, 1988, Ottawa. Some, of course, would argue that the phrase "protection of the public" has become more narrowly associated with the notion of "incapacitation" discussed below. See Sentencing Commission Report, supra, footnote 44, at pp. 145-147.

[50]This public/private distinction is often resorted to in describing criminal law in introductory texts. See for example, Cross and Jones, Introduction to Criminal Law.

This emphasis on public protection and de-emphasis on compensation has become the focus of criticism of victims rights groups, to be discussed below.

effect of the criminal sanction from the perspective of most offenders, is punishment or retribution.[51] Retribution is the commonplace notion justifying the imposition of the criminal sanction whereby it is said that the person who chooses to break the law deserves to be punished.[52] This concept underpins the Criminal Records Act[53] in so far as it is understood that people who have served their sentence and "paid their debt to society" merit having their record expunged if they have been of good behavior for the requisite statutory period. Retribution, of course, differs from vengeance in that it is a measured social response to the harm done to society by the offender (the "eye for the eye" but no more) and is not the mere infliction of limitless pain on a wrongdoer.[54] During the period from the early twentieth century until the 1960's, retribution was down played. Described as backward looking and akin to vengeance, retribution as a purpose of the criminal sanction gave way to the forward looking, utilitarian goals meant to reduce crime, such as deterrence, rehabilitation and incapacitation.[55] Interestingly enough, the leading Nova

[51] For a summary of classical notions of retribution see Nigel Walker,

[52] It is this principle upon which we base our basic notions of fault or mens rea in general criminal law theory. For a discussion of the fault notion and its constitutional importance under the Charter, see Bruce P. Archibald, "The Constitutionalization of the General Part of Criminal Law", (1988) 67 Can. Bar Rev. 1.

[53] R.S.C. 1985,

[54] The consideration of the place of the lex talionis in the history of western civilization is beyond the scope of this paper! However, see Walker, supra, footnote 51.

[55] The ascendancy of the utilitarian approach can be seen in the Report of the Royal Commission to Investigate the Penal System of Canada (Archambault Report), Queen's Printer, Ottawa, 1938; and the Report of a Committee Appointed to Inquire into the Principles and Procedures followed in the Remission Service of the Department of Justice of Canada (the Fauteux Report), Queen's Printer, Ottawa, 1956, which led to the establishment of the national Parole Board in 1959. A good brief discussion of "reductivism" is found in Eric Colvin, Principles of Criminal Law, Carswell, Toronto, 1986.

Scotian case on sentencing decided at the end of this period makes no reference to retribution as one of the purposes of the criminal sanction.[56] However, more recent jurists and sentencing reformers have returned to refurbished retributive principles under the label "just deserts" in order to salvage sentencing policy from the excesses of the utilitarian approach.[57]

(2) Deterrence

Having broached the topic of utilitarian purposes for the criminal sanction, a word is in order concerning deterrence. The deterrence rationale for punishment has been prominent in western penological thought since the eighteenth century,[58] and is now understood to include what are termed "general" and "particular" deterrence.[59] An effective general deterrent is said to be that degree of punishment which will inhibit members of the general public from committing the offence in question, while particular deterrence is that thought sufficient to prevent the accused in question from re-offending. These amounts,

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[56]R v. Grady, supra, footnote 48. See, however, the more comprehensive Nova Scotian decision from the same era, R v. Fairn (1973), 12 C.C.C. (2d) 423 (N.S. Co. Ct.). The Supreme Court of Canada has had no difficulty in naming punishment as a purpose of the criminal sanction: see Smith v. The Queen, [1987] 1 S.C.R. 1045.

[57]The primary theorist of the new just deserts model is the American Andrew Von Hirsch. See his influential Doing Justice: The Choice of Punishments, Hill and Wang, New York, 1976; and his more recent Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals, Rutgers U. Press, New Brunswick, 1985. As to sentence reform, see Ken Pease and Martin Wasik (eds.), Sentencing Reform: Guidance or Guidelines? Manchester U. Press, Manchester, 1987; or the helpful summary of American sentencing reforms in the Canadian Sentencing Commission Report, supra, footnote 44, at pp. 283-301.

[58]The foundations of classical criminology were grounded in deterrent theory in 1764 with Cesare Biccaria's On Crimes and Punishments, translated by Henry Paolucci, Bobbs Merrill, Indianapolis, 1963.

[59]For a standard treatment see Ruby, Sentencing, supra, footnote 20, pp. 5-10.

of course, may differ.[60] Conventional wisdom is that general deterrence has differential thresholds of success in relation to three categories of people: (a) those for whom the mere existence of the law or the threat of a sanction is sufficient to ensure compliance; (b) those determined individuals for whom no level of threatened sanction will curb behavior; and (c) that group of rational would be criminals who will weigh the degree of severity of the sanction against the benefit to be derived form the commission of the crime.[61] For the first category, general deterrence amounts to social control through a "denunciation" of the conduct declared by the state to be criminal and seems effective for a large but indeterminate group of people. This purpose has been strongly advocated by the Law Reform Commission of Canada.[62] For the second category, deterrence is of no value. For the third category, deterrence might work in principle but the theory of deterrence assumes a uniformity and rationality of crime causation which is not supported by scientific evidence.[63] Social science evidence on the effectiveness of deterrence is inconclusive to say the least.[64] Given the haphazard way in which the news media report criminal sanctions to the general public, there is little reason to think that raising the level of

[60]For a judicial treatment of this problem see R v. Fairn, supra, footnote 56.

[61]This approach has been attractive to modern economists. See Gary S. Baker, "Crime and Punishment: An Economic Approach" (1968) 76 J. of Pol. Economy 169-217. It is mentioned in R v. Fairn, supra, footnote 56.

[62]Law Reform Commission of Canada, Our Criminal Law, Ministry of Supply and Services, Ottawa, 1976.

[63]For an excellent review of theories of crime causation, see George B. Vold and Thomas J. Bernard, Theoretical Criminology (3rd ed), Oxford U. Press, Toronto, 1986.

[64]See Cousineau, Legal Sanctions and Deterrence, supra, footnote 9.

sentence in any particular case will act as an effective general deterrent.[65]

(3) Incapacitation

The second weapon in the utilitarian arsenal in the fight against crime is incapacitation. This strategy relies primarily on the sanction of incarceration, and is premised on the common sense proposition that jailed offenders are by definition not capable of committing crimes affecting society at large (although they may commit crimes in prison). This purpose for the criminal sanction rests on the notion that the offender being sentenced would commit further crimes if given a sanction to be served at large in the community.[66] The difficulty in its use is that it relies upon the assumption that it is possible to predict dangerousness or the certainty that an individual offender will recidivate. While many are quite sanguine about the system's capacity to do this,[67] the most prevalent view is that in most cases we simply do not have the capacity to predict the future behavior of individuals and the concomitant need for incapacitation in most situations.[68]

(4) Rehabilitation

Rehabilitation is a purpose for the criminal sanction which has emerged from a recent but mercifully brief eclipse. Depending upon one's strategy this

[65]This is the conclusion in the Canadian Sentencing Commission Report, supra, footnote 44 at pp. 135-138.

[66]See A. Blumstein, J. Cohen and D. Nagin (eds.) Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates National Academy of Sciences, Washington, 1978, p. 9.

[67]P. Greenwood, Selective Incapacitation, 1982. Also the majority of the Supreme Court of Canada in Lyons v. The Queen, [1987] 2 S.C.R. 309.

[68]A. Von Hirsch, "Selective Incapacitation Re-examined: The National Academy of Sciences' Report on Criminal Careers and 'Career Criminals'" (1988) 7 Criminal Justice Ethics 19; also C. Webster, B. Dickens and S. Addario, Constructing Dangerousness: Scientific, Legal and Policy Implications, Dept. of Justice, Ottawa 1985.

purpose is also known as reform or treatment. While the rehabilitative ideal dominated penology in the early part of the twentieth century, there was widespread disillusionment with rehabilitation in the last 1960's and 1970's.[69] Indeterminate sentencing systems in many American states were subjected to the scrutiny of comparative statistical research. It was found that prisoners detained for the supposedly humane purpose of rehabilitation or treatment were spending more time behind bars on average than in states where the avowed purpose was punishment for a relatively fixed period.[70] Prisons were revealed not to improve prisoners but to be schools for crime.[71] Moreover, the title to a famous publication became twisted into slogan by which to bludgeon the rehabilitative ideal: "Nothing works", it was said.[72] Correctional officials excised the language of "rehabilitation" and treatment" from their vocabularies, and strove instead to achieve the more limited goal of "re-integration" of offenders at the end of periods of incarceration through providing "opportunities for self-improvement" to willing offenders.[73] However, persistent research and action by those committed to the goal of rehabilitation has demonstrated that, while many rehabilitative programmes have failed in the past because they were poorly

[69]Francis Allen, "Criminal Justice, Legal Values and the Rehabilitative Ideal," (1959), 50 J. of Crim. L., Criminology and Police Sci 226-232; and Francis Allen, The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose, Yale U. Press, New Haven, 1981.

[70]American Friends Service Committee Working Party, Struggle for Justice: A Report on Crime and Punishment in America, Wang and Hill, New York, 1971.

[71]L. Sechrest, S. White and E. Brown (eds.) The Rehabilitation of Criminal Offenders, National Academy of Sciences, Washington, 1979: D. Lipton, R. Martinson and J. Wilks, The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies, Praeger, New York, 1975.

[72]R. Martinson, "What Works? Questions and Answers about Prison Reform" (1974), 35 The Public Interest 22-54.

[73]See Correctional Law Review, Working Paper No. 1, Correctional Philosophy, Ministry of the Solicitor General, Ottawa, 1986.

thought out or inadequately implemented, rehabilitation and treatment can work. Certain strategies for carefully selected offenders when properly carried out yield significantly positive results.[74] Rehabilitation or treatment as purposes for the criminal sanction are alive and well, though tamed.

(5) Compensation and Victim/Offender Reconciliation

A final purpose for the criminal sanction, which in the minds of many is linked to rehabilitation, has emerged from the margins of criminal law doctrine to a prominent place much closer to the centre. This is the matter of compensation and restitution to victims of crime. In the 1970's and 1980's the victims rights movement conducted a successful crusade against the state-centred image of criminal justice which treated victims as mere witnesses in the process and relegated reparation primarily to the civil sphere through tort law.[75] While some critics have pointed to the spectre of victims perverting the criminal justice system in a private quest for vengeance,[76] the renewed place of the victim in the criminal code is assured through improved mechanisms for compensation,[77] as well as victim impact statements.[78] The link to rehabilitation is achieved through victim/offender reconciliation schemes which

[74]Paul Gendreau and Robert R. Ross, "The Revivification of Rehabilitation: Evidence from the 1980's" (1987), 4 Justice Quarterly 349; and Francis T. Cullen and Karen E. Gilbert, Reaffirming Rehabilitation, Anderson Publishing, Cincinnati, 1982.

[75]I. Waller, The Role of the Victim in Sentencing and Related Processes, Dept. of Justice, Ottawa,

[76]For example, see [1940] 3 D.L.R. 606 (Que. C.A.).

[77]Criminal Code, s.725. Note there are extensive unproclaimed amendments enlarging this provision via Stats. Can. 1988, c.30, s.6.

[78]Ibid., s.7.

are now being run in many Canadian jurisdictions.[79] Though largely restricted to non-violent offences,[80] these programmes are designed not only to meet the needs of the victim, but to ensure that the offender comes to terms with his or her responsibility for anti-social conduct as a crucial step in a rehabilitative strategy.[81]

The foregoing truncated catalogue of the purposes of the criminal sanction has intentionally avoided discussion of how these purposes are related to the task of the sentencing judge. The reason for this is to highlight the distinction which ought to be made between these purposes of the criminal sanction and the principles which should govern sentencing. Purposes of the sanction and sentencing principles are closely related but not identical, as the next section will attempt to demonstrate.

B. Principles for Determining Severity of a Sentence

The "just deserts" proponents demonstrate convincingly that the traditional utilitarian purposes for the criminal sanction provide no adequate basis for determining the relative severity of the sentence which ought to be meted out to a particular offender.[82] The interests of general deterrence may justify the imposition of a far harsher penalty than the gravity of the offence or the degree

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[79]See John Eckstedt and Margaret Jackson, A Profile of Canadian Alternative Sentencing Programmes: A National Review of Policy Issues, Department of Justice, Ottawa, 1988.

[80]But see the "Genesee Justice" programme which seems successful in reconciling victims and offenders even in serious crimes of violence. Brochures available from the Community Service/Victim Assistance Programme, Genesee County Sheriffs Department, County Building #1, Batavia, N.Y., USA 14020-3199.

[81]This approach was greeted with enthusiasm in the Sixth Report of the Standing Committee on Justice and the Solicitor General (The Daubney Committee), Taking Responsibility, House of Commons, Ottawa, 1988, pp. 97-98.

[82]In particular, see Von Hirsch, supra, footnote 57.

of the offender's culpability would otherwise warrant.[83] Similarly, if an offender needs rehabilitation in order to enable him or her to conform to the dictates of lawfulness in society, the period of time required to accomplish such a complex task may be far longer than that of any period of incarceration or control forced upon the offender under a just deserts scheme.[84] Conversely, is it self evident that where two accused have jointly committed a criminal offence, the one who has found a job and has good rehabilitative prospects should receive a lesser penalty than his or her colleague who languishes on unemployment insurance? Finally, the potential injustice in an incapacitative purpose as the determinant of sentencing severity is manifest in a system where there is no assurance that our capacity to predict dangerousness has any substantial degree of accuracy. This is not to say that the utilitarian purposes for the criminal sanction have no importance for the choosing of sentencing options or the methods of imposing sanctions. Rather, it points to the fact that these purposes do not provide an adequate principle of determining the severity of the sentence.

(1) Proportionality, Equality and Restraint

Justice requires that proportionality, restraint and equality be the primary determinants of the severity of a sentence. Recent Canadian proposals for reform all recognize this reality.[85] The principle of proportionality, from which the

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[83]This, of course, was the gravamen of the charges laid against indeterminate sentencing systems in the United States. See Allen, supra, footnote 69.

[84]Canadian courts of appeal leave open the possibility of sacrificing an offender for the general good in this fashion. See R v. McKinnon, [1970] 1 C.C.C. 340 (Ont. C.A.).

[85]This was the case with the Criminal Law Reform Act, 1984, (Bill C-19) derived from work by the Law Reform Commission of Canada which died on the order paper. It is found in the "Declaration of Purpose and Principles of Sentencing" of the Canadian Sentencing Commission Report, supra, footnote 44, at pp. 153-155; and it was adopted in the Report of the Daubney Committee, supra, footnote 81, pp. 246-247.

corollary principles of restraint and equality are derived, has most usefully been stated thus:

> "The paramount principle governing the determination of a sentence is that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence."[86]

This principle requires the court to consider aggravating and mitigating circumstances relating to the seriousness of the crime,[87] and the accused's degree of culpability.[88] The principle of restraint is variously described as requiring that "a sentence should be the least onerous sanction appropriate in the circumstances",[89] that "the maximum penalty prescribed for an offence should be imposed only in the most serious circumstances",[90] and that "the nature and combined duration of the sentence and any other sentence imposed upon the offender should not be excessive".[91] The principle of equality must be asserted in determining severity of sentence in order to minimize disparity flowing from

[86]Bill C-19, supra, footnote 85, in proposed Criminal Code section 645(3)(a); Sentencing Commission Declaration of Purpose and Principles, supra, footnote 85, section 4(a); and Daubney Committee Report, supra, footnote 81 recommendation 9, p. 248.

[87]Both the Canadian Sentencing Commission and the Daubney Committee, supra, footnote 85, have proposed specific tests of aggravating and mitigating factors drawn from judicial experience; such as use of violence, cruelty to a victim, evidence of organized criminal activity, breach of trust, etc.

[88]Degree of culpability might include such standard factors as the existence or absence of previous convictions, physical or mental impairment, the age of the offender, or the offender's role in the offence. The issue of race will be addressed subsequently.

[89]Both the Canadian Sentencing Commission and the Daubney Committee, supra, footnote 85, have proposed specific tests of aggravating and mitigating factors drawn from judicial experience; such as use of violence, cruelty to a victim, evidence of organized criminal activity, breach of trust, etc.

[90]Canadian Sentencing Commission Declaration, section 4(b); Daubney Committee, recommendation 6(b).

[91]Canadian Sentencing Commission Declaration, section 4(c)(iii); and Daubney Committee, recommendation 6(c).

the sentencing process. A sentence must "be consistent with sentences imposed on other offenders for similar offences committed in similar circumstances."[92]

The principle of proportionality or just desert appears to be receiving the imprimative of the Supreme Court of Canada as a matter of constitutional doctrine.[93] In striking down penal laws invoking the combination of absolute liability and imprisonment,[94] conviction for murder without requiring proof of fault,[95] and automatic minimum penalties with no regard to the gravity of the offence or degree of culpability of the offender,[96] the court has repeatedly invoked the principle of proportionality. This approach by the court seems rooted in its apparent acceptance of the fact that "punishment" is an inevitable aspect of our criminal law.[97] Moreover, it is consistent with public views of the purpose of the criminal sanction and the sentencing reform proposals described above.

In this context, the utilitarian approach of some Canadian courts of appeal is potentially contrary to the principle of proportionality, and thus constitutionally suspect. For example, in the Grady case, the Nova Scotia Appeal Division finds that the primary purpose of sentencing is the protection of the

[92]Canadian Sentencing Commission Declaration, section 4(c)(iii); Daubney Committee, recommendation 6(a).

[93]See Bruce P. Archibald, "Crime and Punishment: The Constitutional Requirements for Sentencing Reform in Canada", Revue Juridique Themis, forthcoming, 1989.

[94]Reference re Section 94(2) of the Motor Vehicle Act (B.C.), [1985] 2 S.C.R. 492.

[95]Vaillancourt v. The Queen (1987), 81 N.R. 115 (S.C.C.).

[96]Smith v. The Queen, [1987] 1 S.C.R. 1045.

[97]The word "punishment" is used by Wilson, J. in the B.C. Motor Vehicle Reference case, supra, footnote 94 at pp. 533-534, as does Lamer, J. in Vaillancourt, supra, footnote 95, at pp. 131-132, although in association with the words "stigma" and "penalty".

public, and that this aim is to be achieved through (a) deterrence (general or particular) or (b) reform and rehabilitation or a combination of (a) and (b).[98] As a principle for determining the severity of the criminal sanction this approach is inadequate. It ignores the principles of proportionality, restraint and equality, and as such may be thought a possible basis for depriving someone of their liberty other than in accordance with principles of fundamental justice.[99] Of course Nova Scotian courts in reality ignore the Grady decision. After an abstract recital of the famous passage from Grady, sentencing courts look to the appropriate guideline judgment from the Court of Appeal for the type of offence in question,[100] and then consider the various aggravating and mitigating factors arising from the evidence. In other words, they consider the principle of proportionality as they should. The difficulty, however, is that where general deterrence is over-emphasized restraint may be sacrificed, and where the rehabilitative potential of the offender is over-emphasized equality may be sacrificed. The Grady decision reinforces this dichotomy between deterrence and rehabilitation which has bee shown to be a primary source of sentencing disparity.[101]

(2) Limiting Retributivism or Hybrid Sentencing Principles

The reconciliation of proportional sentencing principles with utilitarian purposes of the criminal sanction is possible. Often this reconciliation is

[98]Grady, supra, footnote 48.

[99]This, of course, is the constitutional standard of Charter section 7.

[100]The guideline judgment in robbery matters, for example, is

[101]This is the problem researched by Hogarth, supra, footnote 45, and Polys and Divorski, supra, footnote 45.

identified by the designation "limiting retributivism",[102] although the Canadian Sentencing Commission and the Daubney Committee proposals both attempt to introduce variants of this kind of solution without using the label. The fundamental basis for the compromise is that principles of proportionality or just desert are primary in determining the severity of the sanction, however, within these outer limits, utilitarian purposes, particularly rehabilitation and victim offender reconciliation, ought to be given full scope for implementation. Thus the Canadian Sentencing Commission proposes that within the confines of sentencing options determined by proportionality, restraint and equality, "the court may give consideration to any one or more" of the following:[103]

> " (i) denouncing blameworthy behavior;
> (ii) deterring the offender and other persons from committing offences;
> (iii) separating offenders from society, where necessary;
> (iv) providing for redress for the harm done to individual victims or to the community;
> (v) promoting a sense of responsibility on the part of offenders and providing for opportunities to assist in the rehabilitation as productive and law-abiding members of society."

Some writers recognize that in such a hybrid system, proportionality may sometimes have to give way to pressing utilitarian concerns.[104] However, the main difficulty in implementing such an approach is to set out a range of sentencing options capable of achieving the utilitarian purposes which can be evaluated against one another in accordance with the principles of just desert. These matters are canvassed in the next section.

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[102]This phrase is used by Nigel Walker, supra, footnote ; and is approved in Andrew Ashworth, Sentencing and Penal Policy, George Wiedenfield and Nicholson, Ltd., London, 1983. See also Norvell Morris, Madness and the Criminal Law,

[103]Canadian Sentencing Commission, Declaration, section 4(d).

[104]Paul H. Robinson, "Hybrid Principles for the Distribution of Criminal Sanctions", (1988) 82 Northwestern U.L. Rev. 19.

C. Proportionate Sentencing Options

The sentencing options available to Canadian criminal courts, in formal terms, are imprisonment,[105] fine,[106] fine options,[107] suspended sentences,[108] probation orders,[109] compensation orders,[110] and conditional and absolute discharges.[111] While this might seem a limited range of alternatives, they can be applied in such a manner as to provide a good deal of flexibility to the court in seeking to achieve one or more of the purposes of the criminal sanction discussed earlier. The way in which the Criminal Code is drafted, however, has tended to reinforce the notion that imprisonment is the "normal" sanction and that all others are "lesser" alternatives.[112] Harkening back to the Grady principles of sentencing, this has meant in practice that when a court sees deterrence as the primary applicable goal in the circumstances it imposes a term of imprisonment; when the goal is rehabilitation a non-carceral sanction is imposed.[113] Indeed, Canadian sentencing reformers have been quite adamant that "a term of imprisonment should not be imposed, nor its duration determined,

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[105]Criminal Code, ss. 717, 730-734.

[106]Criminal Code, s. 718, 719.

[107]Criminal Code, s.718.1.

[108]Criminal Code, s.737.

[109]Criminal Code, s.737.

[110]Criminal code, ss. 725 and 726.

[111]Criminal Code, s.736.

[112]Criminal Code, s.718 indicates that fines are "in lieu of any other punishment" or "in lieu of imprisonment".

[113]This is the phenomenon described in Hogarth, supra, footnote 45, as well as Paul Nadin-Davis, Sentencing in Canada, Carswell, Ottawa, 1982.

solely for the purpose of rehabilitation".[114] While this view is sound, in that prisons have been found not to be rehabilitative environments, it has reinforced the view that non-carceral sentences are not <u>really</u> punishment. This view can even be inferred from much work done in the field of sentencing reform where sophisticated sentencing guidelines have been developed to adjust length of prison sentences to principles of just desert while leaving non-carceral sanctions in the unstructured discretion of the courts.[115] But some non-carceral sanctions are clearly more primitive or restrictive of an offender's liberty than others, and an attempt must be made to work out equivalencies. Moreover, as the principle of restraint and the dictates of financial constraints on governments conspire to put emphasis on non-carceral sanctions, their place in the proportional or just deserts scheme of things will have to be worked out with considerable care.

(1) Rating the Relative Severity of Community Sanctions

The first step in this process must be to work out the relative levels of severity among the sanctions or sentencing options available to the courts. It may be helpful to look briefly at incarceration prior to examining the more difficult issues in rating severity of community sanctions. The initial response on the imprisonment side is to say the system is capable of making quantitative judgments only and not qualitative ones. We know that spending 90 days in jail is worse than spending 10 days in jail, but we are unable to determine (at least formally) whether spending 18 months in the Halifax Correctional Centre is worse

[114]See Canadian Sentencing Commission Declaration, section 4(c)(iv), or the Daubney Committee Report, recommendation 6(d) and 6(e).

[115]While the Canadian Sentencing Commission has put more emphasis on what it called "community sanction" than most of its analogues in other jurisdictions, the Commission acknowledges the limitations of its work, and proposes that the task of rationalizing community sanctions be undertaken by a permanent sentencing commission. See Canadian Sentencing Commission Report, pp. 372 and 373.

than 2 1/2 years in Springhill Institution or vice versa. Similarly, it would depend on an offender's individual circumstances whether serving thirty days consecutive time is more harsh than spending 30 days in jail intermittently served on weekends and holidays. Given these difficulties, the system may have to be content with assuming that a day in jail is a day in jail for calculating relative proportionality, although it would clearly be in accordance with the principle of restraint to take into account the offender's preferences where feasible. It seems that sentencing guideline systems whether or statutory or judicial origins have nowhere attempted to make explicit qualitative judgments about time served in different institutions.[116]

If calculating severity and proportionality in relation to prison terms is not without its difficulties, non-carceral sentences or community sanctions pose greater problems by virtue of their diversity. But a rational approach to the retributive as well as rehabilitative or reconciliatory nature of community sanctions is key to having community sanctions accepted as sentences in their own right--not just alternatives to the so-called <u>real</u> penalty of imprisonment. If community sanctions are to be imposed in a manner consistent with principles of proportionality, equality and restraint, the system must have a way to evaluate their relative retributive weight. What is required is a table of equivalencies for community sanctions.

In order to enforce the possibility of creating a table of equivalencies for community sanctions, it is necessary to describe the available alternative

[116] It is beyond the scope of this paper to consider the impact of the parole system on the manner in which one calculates the severity of imprisonment. The Canadian Sentencing Commission Report canvasses this problem in considerable detail under the heading "the meaning of a sentence of imprisonment" and concludes that full parole release ought to be abolished as being in conflict with the principle of proportionality, pp. 233-267. The Daubney Committee did not recommend abolition of parole, but proposes that the eligibility period for full parole release be increased from one third to one half of he period of imprisonment. See its recommendation 47.

community sanctions in more concrete terms. A recent study of alternative sentencing programmes in Canada lists the major options as fine options, community service orders, restitution programmes, victim-offender reconciliation programmes and attendance programmes.[117] The Canadian Sentencing Commission also considers fines and probation as falling under the rubric of community sanctions since they are non-carceral even though they are not so "innovative".[118] Community service orders, victim/offender reconciliation programmes and the various attendance programmes are not sentences in their own right, but are imposed in the discretion of the court by means of conditions in probation orders[119] and conditional discharge orders.[120] This secondary status is thought to have limited their attractiveness and credibility as sentencing alternatives in the eyes of many judges.[121]

Fines are clearly a punitive measure usually imposed with a view to deterrence, but with virtually no rehabilitative characteristics. It is said that in Canada "over 90% of convictions in summary conviction matters and up to one third of convictions in indictable offences result in the imposition of fines.[122] Unlike some countries Canada give very little statutory guidance as to how heavy a fine to impose in relation to particular offences committed in

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[117]John Ekstedt and Margaret Jackson, A Profile of Canadian Sentencing Programmes: A National Review of Policy Issues, Dept. of Justice, Ottawa, 1988, and also their Alternatives to Incarceration/Sentencing Option Programmes: What are the Alternatives, Dept. of Justice, Ottawa, 1988. Both are research papers conducted for the Canadian Sentencing Commission.

[118]Canadian Sentencing Commission Report, pp. 353-4, 374-388.

[119]Criminal Code, s.737. Restitution requirements may also be included in probation orders.

[120]Criminal Code, s.736.

[121]Canadian Sentencing Commission Report, pp. 347-349.

[122]Simon Verdun-Jones and Teresa Mitchell-Banks, The Fine as a Sentencing Option in Canada, Dept. of Justice, Ottawa, 1988.

particular circumstances.[123] Canada has a system of "global fines" which notionally suggest that a particular offence in certain circumstances is worth "X dollars". The tariff ranges within statutory maxims are the product of individual judicial decisions, informal judicial consultation, use of precedent and minimal guidance form courts of appeal. Setting the amount of the fine in terms of the accused's ability to pay has been formally rejected by courts of appeal on the grounds of "equality before the law".[124] Reformers have consistently argued that a system of "day fines" be adopted as in many other countries[125] whereby an offender would be fined "x days'income".[126] By abandoning formal legal equality in favour of a system which would distribute deterrent penalties in accordance with calculable economic differences among offenders, such a system, if widely adopted in Canada,[127] would break certain conceptual barriers and taboos about punishment having to be "neutral on its face". But whether one fines in global dollars or day fine units, the notional application of the principles of proportionality, restraint and equality can be worked out quite systematically--the more serious the offence the higher the fine and vice-versa.

[123]See Calvert R. Dodge, A World Without Prisons: Alternatives to Incarceration throughout the World, Lexington Books, Lexington, 1979,

[124]R v. Natrall (1973), 9 C.C.C. (2d) 390 (B.C.C.H.); R v. Johnson (1971), 5 C.C.C. (2d) 541 (N.S.S.C., App. Div.); Johnston v. Tremayne, [1970] 4 C.C.C. 64 (Ont. C.A.); and R v. Carroll (1980), 27 Nfld. & P.E.I.R. 159 (P.E.I.C.A.).

[125]Day fine systems, first introduced in Finland, are now operative in Sweden, Denmark, Peru, Costa Rica, Bolivia, West Germany and Australia. See Verdun-Jones and Mitchell-Banks, supra, footnote 121 at p. 42.

[126]For a description of one of the most successful systems, see Hans Thorstedt, "The Day Fine System in Sweden" [1975] Crim. L. Rev. 307-312.

[127]The Canadian Sentencing Commission Report, p. 378 recommends use of a day fine system pursuant to study by a permanent sentencing commission and advocates pilot projects in the province. For similar recommendations see: Law Reform Commission of Canada, Guidelines, Dispositions and Sentences in the Criminal Process, Ministry of Supply and Services, Ottawa, 1977.

Probation orders may be imposed in conjunction with conditional discharges, suspended sentences, fines, or imprisonment on an intermittent basis or straight time of less than 2 years.[128] Being both ancillary to other measures and of such flexibility it is difficult to evaluate the probation order per se in terms of just desert. Standard conditions in probation orders include reporting regularly to probation officers, providing support to dependents, abstaining from use of alcohol, prohibition of ownership or possession of a weapon, restitution to victims, remaining within the jurisdiction, and making reasonable efforts to find suitable employment.[129] Probation orders are thus measures of social control with a re-integrative, if not rehabilitative, twist. A probation period is limited to a maximum of three years, and as such is at the lower end of the punitive scale.[130] On the other hand, there is no doubt that the offender's liberty is being curtailed and the recipient is suffering retribution for he offence committed even if rehabilitative measures are in the minds of the judge or the probation staff.[131] Thus a probation order connected with a suspended sentence or condition discharge, even with the least onerous standard conditions, can be rated on a "table of equivalencies" ordered in accordance with proportionality, equality and restraint. They are not simply non-entities from the retributive perspective. The point here, however, is that probation orders can be rated according to limiting retributivist principles of sentencing while being directed to utilitarian purposes of the criminal sanction within those

[128]Criminal Code, sections 736 and 737.

[129]These are the conditions listed in Criminal Code section 736.

[130]Criminal Code, section 738(2).

[131]It is said that the current ratio of offenders on probation in Nova Scotia in relation to those in custody is approximately 10:1--the highest in Canada. Nova Scotia Department of the Solicitor General, Correctional Services - Department of Solicitor General - Overview, unpublished departmental manuscript, 1988.

limitations.

Community service orders are non-custodial dispositions whereby the offender serves his sentence by performing a number of hours of work in non-profit com unity projects as designated by the court. Community service orders emerged in the late 1970's and 1980's[132] as a result of judicial creativity in the interpretation of the Criminal Code provision authorizing as the term of a probation order " . . . such other reasonable conditions as the Court considers desirable for securing the good conduct of the accused and for preventing a repetition by him of the same offence or the commission of other offences".[133] The purposes of the community service order include punishment, reparation and rehabilitation.[134] Their popularity of late, however, is in no small measure due to the fact that they potentially alleviate jail over-crowding[135] and are a means by which to reduce the costs of corrections.[136] From a rehabilitative point of view community service orders allow for development of improved work habits, acquisition of new skills and the cultivation of helpful contacts in the general

[132]An extensive bibliography of Canadian government documents describing the use of community service orders is found in Ekstedt and Jackson, A Profile of Canadian Alternative Sentencing Programmes: A National Review of Policy Issues, Dept. of Justice, Ottawa, 1988 at pp. 223-225.

[133]This use of Criminal Code section 737(2)(h) received court of appeal approved in R v. Shaw and Brehn (1977), 36 C.R.N.S. 358 (Ont. C.A.) inter alia.

[134]For a succinct discussion of these purposes, see Ekstedt and Jackson, supra, footnote 131 at pp. 23-26, as well as their subsequent descriptions of programmes in all Canadian provinces where they are operative.

[135]The Canadian Sentencing Commission Report pp. 367-371 cautions about the problem known in the literature as the "widening of the net" whereby community sanctions are used not to reduce imprisoument but rather to impose more onerous sanctions on persons who might otherwise receive less intrusive conditions in probation orders.

[136]It has been estimated that for Ontario in 1979 imprisonment of an offender cost $50 per day while supervision via a community service order cost only $2.35: Ekstedt and Jackson, ibid, at p. 25, citing M.L. Polanoski, The Community Service Programme in Ontario: A Description of the Initial Cases, Ministry of Correctional Services, Toronto, 1979.

community. This is accomplished in a manner which avoids the negative aspects of institutionalization from prison culture.[137] In addition, the offender may creatively "pay the debt" he or she owes to society--with attendant material benefit to the community and possible psychological benefit to the offender.[138] From the retributive angle the accused is penalized through restrictions on his or her liberty and the requirement to contribute his or her efforts to the community project. Most importantly for our discussions here, hours of community service are quantifiable. While there may be qualitative differences between various community projects, the yardstick of hours of service can be used in calculating proportionality, equality and restraint in relation to other forms of sanction.

In so far as calculating "just deserts" are concerned, victim/offender reconciliation programmes can be perceived as specialized forms of community service orders with particular correctional goals. Proponents of such programmes argue strongly that they humanize the criminal justice system, are effective in rehabilitating certain classes of offenders, provide reparation to victims, and improve the criminal justice system in the eyes of victims and the general public.[139] From a retributive point of view they constrain the offender's freedom, and impose losses in terms of time which can be computed in the same manner as hours of community service. Depending upon how positively the system evaluated the goal of victim/offender reconciliation, a premium or bonus might be

[137]On the devastating effects of prison culture in general see L.H. Bowler, Prison Societies and Corrections: The Science and the Art, MacMillan, Toronto, 1982. For description closer to home, read Michael Harris, Justice Denied: The Law versus Donald Marshall, MacMillan, Toronto, 1986, passim.

[138]For a discussion of this side, see

[139]The Daubney Committee Report is most enthusiastic about victim/offender reconciliation programmes, at pp. 90-97. For a description of Canadian programmes see Ekstedt and Jackson, supra, footnote 131.

added in relation to "time served" in this way.

(2) The Fine Option Programme and Conversion Tables

Lest it be thought that the exercise of creating equivalents between sanctions is an unattainable goal which can only be advocated for some upcoming utopia, let us recall that the future is now partly with us in the form of the fine option. Criminal Code section 718.1 creates the possibility for an offender who has been fined to "discharge the fine in whole or in part by earning credits for work performed during a period not greater than two years in a program established for that purpose . . . ". Such programmes have been set up in a number of Canadian provinces, following the lead of Saskatchewan in 1975.[140] The recent case of Hebb v. The Queen in Nova Scotia[141] gives a constitutional push for the creation of fine option programmes in those provinces which have not yet established them. The Criminal Code also states that these programmes " . . . shall determine the rate at which credits are earned and may provide for the manner of crediting any amounts earned against the fine and any other matters necessary for or incidental to carrying out the program."[142] In other words, programmes must work out on principles of proportionality, equality and restraint a table of equivalents for converting fine amounts into hours of community

[140]For a description of Canadian programmes see Ekstedt and Jackson, supra, footnote 131, passim.

[141]Supreme court of Nova Scotia February 7, 1989, per Kelly, J., as yet unreported, wherein the court struck down those words in Criminal Code section 718(10) which directed courts to consider ability to pay prior to imposing imprisonment in default of the payment only in cases where the accused was between 16 and 21 years of age. The court held this must now be done in all cases.

[142]Criminal Code, section 718.1(2).

service and vice versa.[143] This is currently being done in Ontario, Manitoba, Saskatchewan, Alberta and the Northwest Territories.[144]

It is a short step from a conversion table for fine amounts and community service hours, to a table which would include time served in prison as well. In fact this step is implicit in the Criminal Code which now allows proportionate reduction of time served in default of fine payment through part payment of the fine or by community service in a fine option programmes.[145] In fact, Ekstedt and Jackson assert:

> "There is an informal set of standardized equivalences between monies paid, community hours worked and time spent in jail in Saskatchewan, according to the [Saskatchewan] Corrections Branch, although few knew of it or whether it is used by the courts. The Corrections Branch also suggested that some of the judiciary were reluctant to accept such a request for equivalencies from Corrections as they were concerned about being influenced by a government department."[146]

These same Canadian provinces are close to attaining a "standard sanction unit" of sentence severity by which to equate time served in jail, time served in community sanctions and fine amounts.[147] Canada seems further advanced than many other jurisdictions in this regard, although there are many problems yet to

[143]Criminal Code section 722 authorizes reduction of imprisonment for part payment, while section 718.1 gives the fine option to an offender . . . "whether or not the offender is serving a term of imprisonment imposed in default of payment of the fine".

[144]John Ekstedt and Margaret Jackson, Alternatives to Incarceration/Sentencing Option Programmes: What are the Alternatives, Dept. of Justice, Ottawa, 1988, pp. 54-55.

[145]For a conceptual approach to this issue see Martin Wasik and Andrew von Hirsch, "Non-Custodial Penalties and the Principles of Desert" [1988] Crim. L.R. 555.

[146]Supra, footnote 144.

[147]Supra, footnote 145.

resolve.[148]

It ought to be stressed here that a conversion table, or table of equivalences, is in no way counter to the accused's right to individualized justice.[149] Judicial discretion to assess the degree of seriousness of the offence and the degree of the accused's culpability including all aggravating and mitigating factors is left intact.[150] In such a system, judicial discretion is not fettered but its meaning is explained in terms of its effect in relation to other sentencing options. It is important however that judicial input be obtained in the creation of the conversion tables so that those whose decisions will be implemented in accordance with it will have confidence in the system's fairness.[151]

The importance of these nascent conversion tables for coping with problems of racial discrimination in the justice system is that they allow for tailoring

[148]Not the least of which is how to gauge appropriate levels of severity and weight the different sanctions in relation to one another. Some empirical work has been done on seeking public perceptions on these issues. See L. Sebba, "Explorations in the Scaling of Penalties" (1978), 23 J. of Research in Crime and Delinquency 247; L. Sebba and G. Nathan, "Further Explorations in the Scaling of Penalties" (1984), 23 Brit. J. Criminology 22; A. Kapardis and D. Farrington, "An Experimental Study of Sentencing by Magistrates" (1981), 5 Law and Human Behavior 107, and N. Walker and N. Marsh, "Do Sentences Affect Public Disapproval?" (1984) Brit. J. Criminology 27. The Canadian Sentencing Commission Report, pp. 386-387 proposes a system for equating fines and time served in default.

[149]For a discussion of the constitutional nature of the right to individualized justice see Bruce P. Archibald, "Crime and Punishment: The Constitutional Requirements for Sentencing Reform in Canada" (1989) Revue Juridique Thémis, forthcoming.

[150]For a standard list of the factors affecting sentencing, see Ruby, Sentencing, supra, footnote 20, pp. 139-192. Of course, a thorough-going application of the principles of proportionality and equality might make consideration of some of these factors inappropriate. See Archibald, supra, footnote 147.

[151]The Canadian Sentencing Commission Report, pp. 435-456 would solve this problem through judicial involvement in a permanent sentencing commission. Interim measures on a provincial basis however, are possible and some are suggested below under the heading "Allocating Responsibility . . .".

various utilitarian strategies of rehabilitation, crime reduction, and perhaps even affirmative action, while maintaining a precise understanding of how these actions would impact on notions of just deserts. They permit multiple approaches to the purposes of the criminal sanction, while not sacrificing the sentencing principles of proportionality, equality and restraint. An attempt to elaborate on these ideas follows.

III Equality and Affirmative Action in the Choice Among Sentencing Options

It is the intent of this section of the paper to examine the two objectives mentioned earlier, that is, egalitarian sentencing and ameliorative sentencing. In other words, how can racial bias or perceptions of racial bias in sentencing be eliminated, and how can systemic discrimination be reduced, while maintaining adherence to the principles of sentencing just discussed? To do this, approaches to sentencing members of visible minority groups will be analyzed firstly on the assumption of formal equality, and secondly on assumptions of social and economic inequality calling for affirmative action. It may be useful to point out at this juncture that systemic discrimination in the criminal justice system can also be addressed to some extent through prosecution policy. That is, problems may be ameliorated through diversion programmes or measures designed to respond to systemic discrimination by withholding or terminating prosecutions in this public interest as a matter of prosecutorial discretion. The elaboration of principles by which to structure public interest factors in prosecution policy for this purpose is beyond the scope of this paper.[152] This discussion is limited to the stage of the prosecution which follows a finding of guilty--egalitarian and ameliorative sentencing.

[152]These matters are discussed in Bruce P. Archibald, Prosecuting Officers and the Administration of Justice in Nova Scotia, a forthcoming study conducted for the Marshall Inquiry.

A. Sentencing Visible Minority Accuseds on Assumptions of Formal Legal Equality

(1) Colour Blind Sentencing Principles

To sentence a member of a visible minority on assumptions of formal legal equality is to assume that racial discrimination is not causally connected in any way to the accused's criminal behavior. In other words, the accused's race is irrelevant to the principles of sentencing, in so far as determining the severity of the sanction is concerned. Normal principles of proportionality in relation to the gravity of the offence and the degree of culpability of the offender are in play, and the accused is given a sanction equivalent to any other offender for similar offences committed in similar circumstances. In the absence of proof that race was causally related to the crime (such as perhaps a racial insult provoking an assault), or in the absence of a policy of affirmative action sentencing to be discussed below, sentencing on the assumption of formal equality in accordance with general principles ought to be the norm.

(2) Racially Sensitive Purposes and Options

While visible minority status is irrelevant for determining sentence severity on assumptions of formal legal equality, it may be quite relevant for choosing an appropriate sentencing option among a range of those of equivalent severity. Where there are fears that there may be racial bias in sentencing, and where the legal system through applying laws "neutral on their face" may be perpetuating existing social and economic inequality, adopting utilitarian sentencing strategies which are sensitive to racial and cultural differences will increasingly be seen as a measure of the adequacy of the criminal justice system in a multi-cultural and multi-racial society.[153] This can be done without fear

[153]Many of the sentencing alternatives which have been experimented with in western Canada have their origins in concerns as to how the justice system can more adequately respond to the needs of native offenders and native communities.

of a white majoritarian backlash against "special treatment" if a table of equivalences is available.[154]

In concrete terms this strategy stresses the value of community sanctions as a primary strategy for the criminal justice system in general, and recognizes the necessity for community sanctioning options tailored to minority needs in particular. Community service orders can be arranged so as to involve work for black or native communities or charitable organizations which have their roots in these communities. Fine option programmes will, of course, have to be structured along similar lines. Probation orders involving conditions other than community service can take into account the offender's particular needs as derived from his or her status as a member of a visible minority group--particular counselling services with expertise in relating black and minority problems would be particularly apposite.

Victim/offender reconciliation programmes may pose special opportunities for dealing with racial discrimination. A sensitive mediator particularly skilled in victim/offender reconciliation might effect particularly helpful results in inter-racial and inter-cultural understanding as between victims and offenders of differing ethnic groups. On the other hand, a botched attempt at victim/offender reconciliation in this context might have particularly damaging results for race relations.[155]

How the system can move toward these racially sensitive sentencing options will be discussed below. But it is clear that adopting rehabilitative purposes

See the works by Ekstedt and Jackson, supra, footnote 116, passim.

[154]Recent news reports of racially rooted disturbances at a high school in Cole Harbour, Halifax County, Nova Scotia indicate that some sectors of the public thought black "instigators" were getting special treatment.

[155]Human Rights Commissions may have valuable expertise to impart to criminal justice professionals in this regard.

for criminal sanctions, with a content which takes into account the needs and resources of visible minority communities and their individual members, can be one without necessarily abandoning principles of formal legal equality. Proportionality, equality and restraint can predominate in sentencing while using sentencing options designed to alleviate systemic discrimination in society, particularly in a system making use of community sentencing options with an accepted set of standardized equivalent sanctions. Of course racially sensitive programming can and ought to be adopted within the correctional system as well. However, when the gravity of the offence or the needs of particular deterrence of incapacitation dictate a term of imprisonment, the sentencing judge loses capacity to control and individualize sentencing purposes when he or she commits the offender to the care of correctional officials. The use of correctional programming in the struggle against systemic discrimination would be the subject of another paper.

B. Sentencing Visible Minority Accuseds on Affirmative Action Assumptions

Affirmative action involves special treatment to alleviate the problems of groups disadvantaged because of previous adverse treatment or limiting circumstances.[156] Charter section 15(2) provides that the equal protection provision of the constitution:

> " . . . does not preclude any law program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

Thus Canadian legislators and policy makers are more sheltered than their American counterparts in protecting affirmative action programmes from charges

[156]For a brief treatment see Dale Gibson, "Canadian Equality Jurisprudence: Year One" in Sheilah L. Martin and Kathleen E. Mahoney, Equality and Judicial Neutrality, Carswell, Calgary, 1987, at pp. 142-143.

that they are constitutionally prohibited "reverse discrimination."[157] At issue in most of the American jurisprudence is whether visible minorities can be given preferential access to certain privileges or advantages not whether such minorities can be sheltered from general penalties which might otherwise fall upon them with unequal incidence.[158] At issue in this section is the question whether Canadian sentencing policy can proceed from an affirmative action foundation.

(1) Social Responsibility for Crime Causation

Individualistic assumptions about crime causation and personal responsibility for intentional, or at least fault-based, behavior are in seeming contradiction with the use of affirmative action principles in sentencing.[159] If a resident of Canada has committed an offence, ought not that person to be sentenced according to the gravity of the offence and the degree of his or her culpability like any one else? But it is in the phrase the "degree of culpability of the offender" that is found the key to reconciling affirmative action with the principles of just deserts. Any decision to treat certain visible minorities differently in the sentencing process must be based on the idea that society at large shares in the responsibility for the systemic discrimination which is evidenced in the criminal justice system by such factors

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[157]See J. Ely, "The Constitutionality of Reverse Discrimination" (1974), 41 U. of Chicago L. Rev. 723. For a rosy interpretation of U.S. affirmative action jurisprudence see Lawrence H. Tribe, American Constitutional Law (2nd Ed.), Foundation Press, Mineola, 1988, pp. 1521-1544.

[158]See Tribe, ibid.

[159]As was mentioned earlier, Canadian sentencing law is, at first blush, "colour blind". Texts do not mention the topic, see texts in footnote 20, supra.

as disproportionate incarceration rates.[160] From this premise follows the corollary that it is fair to alleviate the severity of a criminal sanction to be imposed upon a member of a visible minority group if it can be said that general social responsibility for his or her community's disadvantaged state reduces his or her degree of culpability for the offence.

(2) Affirmative Action Sentencing Programmes

Were individual judges to make such affirmative action decisions according to their own personal standards of whether a particular accused was led to crime by virtue of cultural, social or economic circumstances linked to racial discrimination, charges of reverse discrimination would probably from the sentencing disparity that such a situation would likely engender. Such an approach might be unconstitutional in any event. Charter section 15(2) only allows such action as a part of a "law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups." If an alternative sentencing option programme were devised for, say, native offenders with a view to improving the lot of the offender as well as the native community as a whole, such a programme would appear to fall within the ambit of section 15(2). It would be constitutional even though it might be thought a less onerous form of criminal sanction, and therefore contrary to principles of proportionality, equality and restraint if these are to be viewed from an individualistic perspective. An individual judge's decision to merely "go easy" on a particular native offender might not withstand such scrutiny.[161]

[160]This notion of social responsibility for certain aspects of crime causation has been recognized to some degree in Scandinavian criminal justice systems. For a Canadian discussion see "A Social Responsibility Approach to Criminal Justice, National Associations Active in Criminal Justice, Ottawa, 1988.

[161]For conflicting judicial approaches to this issue see R v. Firemain (1971), 4 C.C.C. (2d) 82 (Ont. C.A.) and R v. Nagitarvik (1986), 26 C.C.C. (3d) 193 (N.W.T.C.A.).

Quite properly it would seem that an affirmative action sentencing programme is a matter for politicians and policy makers rather than for judicial initiative. Weighing the proper circumstances for the recognition of social responsibility for crime causation and not merely individual culpability is a politically sensitive issue. Charter section 15(2), in speaking of a "law program or activity" of an affirmative action type would seem to require a coherent and structured strategy rather than a mere accretion of individual sentencing decisions with such a goal. Early constitution litigation over section 15(2) indicates that a mere declaration of legislative purpose that a programme has as its object the amelioration of conditions of disadvantages individuals or groups may not be sufficient to enable it to qualify for the affirmative action exception to general requirements of formal legal equality.[162] It has been held that the form of ameliorative action must be rationally related to the cause of the disadvantage.[163]

In order for an affirmative action sentencing programme to validly operate, one might have to demonstrate not only that the visible minority group in question had historically suffered disadvantages, but that these disadvantages are causally related to crime of certain types and that the sentencing options envisaged by the programme will strike at the roots of this causational problem. Meeting these stringent criteria would not be easy given the present state of

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[162]See Apsit v. Manitoba Human Rights Commission (1987) 7 A.C.N.S. (3d) (Man. Q.B., Simonsen, J.) where a plan giving preferred rights to native people in the production and harvesting of wild rice was held not to meet the requirements of Charter section 15(2) nothwithstanding its approval as an affirmative action programme by the Manitoba Human Rights Commission. Note, however, that this was the confiring of a privilege upon the disadvantages group and not the withholding of a penalty. See also Harrison v. U.B.C.; Connell v. B.C., [1987] 2 W.W.R. 688 (B.C.C.A.).

[163]Apsit v. Manitoba Human Rights Commission ibid.

understanding of crime causation.[164] However, it is possible to think of a pertinent example. It seems relatively clear that high rates of certain types of crime among native peoples are causally related to the destruction of native economic, social and cultural patterns through federal government policies in relation to the creation and management of Indian reserves, as well as provincial policies limiting native hunting and fishing.[165] It may be that a separate native justice system involving the restoration of native patterns of social control and social reconciliation could be upheld under Charter section 15(2) regardless of progress, or lack thereof, with respect to the recognition and enforcement of aboriginal rights under Charter section 25.

A more limited version of such a programme might involve continued jurisdiction of general criminal courts with special sentencing options, which might be less severe than the table of equivalencies would normally demand, for native offenders involved with certain crimes under particular circumstances. The sine qua non of such sentencing options, would seem to be that they would effectively assist native offenders in overcoming the disadvantages resulting from systemic discrimination. Until such programmes developed a track record for reducing recidivism rates, this latter requirement might have to be accepted as an article of faith. However, if the rational connection can be demonstrated between the programme and the cause of the disadvantage under Charter section 15(2) they would pass constitutional muster.

[164]See Vold and Bernard, Theoretical Criminology, supra, footnote 63.

[165]See the Report of the Canadian Bar Association. Aboriginal Rights in Canada: An Agenda for Action, Ottawa, 1988 for a general discussion of the situation of native communities from a legal perspective. More importantly see Michall Jackson, Locking Up Natives in Canada, A Report of the Canadian Bar Association Committee on Imprisonment and Release, 1988.

IV Allocating Responsibility for Alleviating through Sentencing Systemic Discrimination and Perceptions of Racial Bias

While the foregoing analysis is optimistic in tone, concerning the prospects for the implementation of racial sensitive sentencing purposes under formally equal sentencing principles and for affirmative action sentencing programmes, one must be quite clear about the limitations of sentencing as a means for alleviating problems of systemic discrimination. As was described in Part I, over representation of visible minorities as accused persons or prisoners is not caused simply by sentencing judges. The social, economic and cultural conditions in a society characterized by systemic discrimination which disadvantage visible minority groups cannot be overcome by judges or sentencing alone. But all those involved in the sentencing bear a responsibility to bring about the kind of improvements in the criminal justice system which are discussed here. In the final analysis, however, the judiciary bears a special responsibility since judges are at the symbolic focal point of the sentencing process. This concluding section will suggest a tentative allocation of responsibilities for change, and make some comment on the particularly difficult situation of the judiciary.

(1) Allocating Responsibility for Change

The most far reaching and comprehensive solutions to the problems discussed here would come from a permanent sentencing commission with authority to issue guidelines on sentencing issues, do research on the empirical effects of alterations in sentencing policy, and adjust guidelines to reflect improvements in sentencing knowledge and the practical experience of courts and correctional personnel. That luxury is not available, but the problems of systemic discrimination exist and successful constitutional challenges to vulnerable

aspects of the criminal justice system are forcing us to take immediate remedial action. Policy makers, crown prosecutors, defence counsel, judges, correctional personnel, legal researchers, and most importantly, leaders of visible minority communities, all have a role to play in this process. Egalitarian and ameliorative sentence developments will come through co-operative effort among all those involved in the criminal justice system.

Policy makers in the Attorney General's Departments and the Solicitor-General's Departments must create a joint task force to flesh out the presently existing skeletal framework of community sentencing options and equivalences among those options. A conversion table allowing for the evaluation of the relative severity of alternative dispositions is within grasp. Moreover, this can be done without in any way adversely affecting the judicial role in providing individual justice in particular cases. Both departments must be involved so that "crime and punishment" are not artificially separated by different responsibilities for prosecution policy and correctional policy. On the other hand, the Solicitor General's department and in particular those responsible for community corrections will bear the brunt of identifying and working with appropriate representatives of visible minority communities to elaborate the details of community sentencing options.

Leaders and organizations within the visible minority communities have the responsibility to press the advantages which are apparent in the present climate of change within the criminal justice system. Rhetorical criticism, satisfying though it may sometimes be, must be abandoned in favour of the elaboration of pragmatic, economical proposals for community sentencing options. These options must be grounded in sound correctional principles and be supported by community organizations committed to assisting in their implementation. Community service placements, victim/offender reconciliation programmes and resources for

specialized probation supervision must be among the options considered. The privatization of some correctional services is being actively considered in many quarters, and those capable of influencing events in visible minority communities ought not to miss this window of opportunity.

Once the groundwork has been laid at the policy level and within the community, those closest to the sentencing process - crown prosecutors, defence counsel and judges - have a responsibility to make egalitarian and ameliorative sentencing alternatives available to appropriate offenders. These players can be assisted in this task by well directed professional education programmes involving participation from policy makers and visible minority community representatives. The annual seminars of crown prosecutors and provincial court judges must make room on their agendas for the topic of implementation strategy for special sentencing measures for certain offenders who are members of visible minority groups. The Barristers Society or the Criminal Law Subsection of the Canadian Bar Association will have opportunities to contribute to this process through their continuing legal education programmes and meetings.

Finally, it is important that legal researchers and social scientists be involved form the outset in the elaboration of sentencing projects and their evaluation. Correctional literature is replete with examples of programmes which, while based on good ideas, have been inadequately executed or not evaluated so that the benefits or drawbacks were either not explored or not fully analyzed for the edification of subsequent generations. The resources of the universities, and in particular those of the Atlantic Institute of Criminology and the Gorsebrook Research Institute, ought not be ignored.

It is only through such a multifaceted strategy that the causes of systemic discrimination can in any way be alleviated through the sentencing process. However, by outlining these inter connecting roles and responsibilities, the

difficulties ought not to be exaggerated. A few key individuals with the will to bring about change, and with the proper institutional resources and community connections could accomplish a great deal. Setting attainable goals, perhaps through pilot projects in the early stages, may be the only realistic way to assure success in the long run.

B. The Symbolic Importance of the Judiciary

The co-operative process described above for implementation of egalitarian and ameliorative sentencing strategies regarding disadvantaged visible minorities could have an impact on systemic discrimination. But the judiciary is still the focus for the perceptions of racial bias in the criminal justice system. There may be nothing that can be done to prevent people from drawing the erroneous conclusion that because there are more visible minority offenders sentenced or imprisoned that sentencing judges are racial prejudiced as a group. Nevertheless, judges, as most well know, must be constantly vigilant to see that inadvertent remarks or insensitive bureaucratic practices do not lead to misinterpretations. Anecdotal isolated incidents of racial discrimination, or rude or insensitive treatment of minority offenders can cause extraordinary damage to the reputation of the criminal justice system. A routine part of orientation training or continuing judicial education seminars might usefully be the introduction of judges to visible minority cultures and minority perceptions of the criminal justice system. The resulting sensitivity might reduce the judicial faux pas which are at the root of some perceptions of racial bias in the courtroom.

Finally efforts must be made to ensure that our court houses are reflections of the preservation and enhancement of the multi-cultural heritage Canadian society which is guaranteed by section 27 of the Charter of Rights and Freedoms. The effect of the impression that court rooms and court houses are white

majoritarian institutions cannot be over-estimated. Greater representation of visible minorities individuals as judges, court reporters, and court administrators can have a visible effect on changing the ambience of judicial institutions. Moreover, this not merely a matter of appearances. Prejudiced individuals who may be working in the system will be much more circumspect about airing unacceptable racist views when in the present of colleagues and co-workers from disadvantaged visible minority groups.

Egalitarian and ameliorative sentencing policies and programmes may help to alleviate some of the causes and effects of systemic discrimination in the criminal justice system. But judges still occupy the symbolic focal point for demonstrating that justice is seen to be done for visible minorities in Canadian society.

SENTENCING
NOW
AND IN THE
FUTURE

CHAPTER 2

SENTENCING VISIBLE MINORITIES

LEAVING OUR WHITE EYES BEHIND

Material prepared by Rupert Ross,
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A. INTRODUCTION: SEEING THROUGH THE RULES

In the 1970's, a group of Mohawk from southern Ontario hosted a sporting tournament to which they invited a group of James Bay Cree. On the Saturday night they prepared a feast. The Mohawk, an agricultural people long before contact with Europeans, had developed a custom of always setting out considerably more food than could ever be eaten. In this way they demonstrated both their wealth and their generosity. The Cree, however, had a different custom. A hunter-gatherer people for whom scarcity was a daily fact of life, their custom involved always eating everything that was set before them. In this way they demonstrated their respect for the successful hunter and for his generosity.

Needless to say, there was a problem when these two sets of rules came into collision. The Cree, anxious to show respect, ate and ate and ate until a number became seriously ill. They thought the Mohawk gastro-intestinal sadists det-

ermined to poison them. The Mohawk thought the Cree ill-mannered boors determined to insult Mohawk generosity. Each group went away believing that the other had intentionally shown insult and disrespect. Each group had, of course, been going to great pains to try to show exactly the opposite. The problem lay in the fact that each group had developed its own unique rules governing not just actions but, more importantly, the sending of signals meant to convey attitudes. When acts are seen but their signal-content misinterpreted, we cannot help but form inaccurate impressions of others, ascribing motivations and attitudes and states of mind which may be well off the mark.

Most Europeans, for example, have an exprectation that someone who won't look you straight in the eye is demonstrating an evasiveness. We suspect that we are being either brushed off or lied to. When we wish to demonstrate our own sincerity and respect, we make a point of squarely facing the other and establishing the strongest eye contact we can sustain. I have learned, to my chagrin, that in some northern Reserve communities looking another straight in the eye is taken as a deliberate sign of disrespect, for their rule is that you only look inferiors straight in the eye. Fortunately, I had not insulted too many people, though only because they knew I was just an ignorant white man who didn't even know <u>how</u> to behave civilly. More unfortunate was the fact that for many years I'd been misinterpreting them, especially on the witness stand. I had been reading evasiveness and insincerity and possible lies when I should have been reading only respect and sincerity.

These two illustrations serve to underline the wisdom of R.D. Laing's cryptic but critical observation that "until you can see through the rules, you can only see through the rules". We interpret what we see and hear through our own cultural eyes and ears. When we deal with people from another culture, our interpretations of their acts and words will very frequently be wrong. It follows that when we respond to their acts and words, relying upon our interpretations of them, we will respond by doing and saying things which we would never consider appropriate had we known the truth.

Sentencing is nothing more than an institutional response to an act or a word. Sentencing Native people - or people from any other culture - poses a very substantial challenge. Sentencing is not, after all, and ends but a means to other ends. It is a tool employed in an effort to accomplish rehabilitation of the individual, deterrence to him and to others in the community, and protection of that community. It requires that we learn as much as we can about that individual and about the context in which he lives. The greater our mis-interpretation, the less likely it is that our sentence will produce the results we intend.

I do not propose to explain Native people and Native communities, because I can't. After twenty years in northern Ontario, I am only just beginning to realize how much I don't know. I propose instead to point out areas in which we should

should exercise great caution in interpreting the acts and words of Native people. My experience is only with the hunter-gather peoples of northwestern Ontario, and I have no way of knowing how applicable that experience is in dealing with Native people in other parts of Canada. If nothing else, I hope to underline one conviction only: we have not understood the degree to which the rules of their culture (or cultures, as the Cree-Mohawk feast story illustrates) differ from ours. We must learn to <u>expect</u> such difference, to be ever wary of using our own cultural assumptions in interpreting their acts and words, and to do our best to discover their realities and their truths. Until we do, we will be serving neither our goals nor their interests.

I wish to emphasize that the communities with which I deal are remote, isolated and self-contained. The majority are accessible only by aircraft. They did not have sustained contact with the majority culture until some 30 years ago, and even now it is sporadic. In fact, they did not <u>exist</u> as year-round, multi-family communities until schools were built, in some case only 20 years ago. Traditional ways - and rules - remain strong, as does the conviction that each individual's interest is secondary to the community interest. Their isolation, both geographically and culturally, from the rest of Canada gives rise to a very pronounced conviction that the community has both a right and a responsibility to be an active player in all aspects of community life, including the criminal law process. Sentencing is, most emphatically, an enterprise in which each community feels a very pronounced interest and may be able to play a very important role. Under-

standing the attitudes and approaches of each community becomes critical if sentences are to show promise of attaining the goals we intend.

B. ASSESSING THE INDIVIDUAL

Central to sentencing deliberations is an assessment of the individual accused. Whether the material reviewed consists of pre-sentence reports, psychiatric assessments, reports from detention facilities or simple observations of his demeanor, we are obliged to do what we can to become familiar with him. Only then can we come to conclusions about his prospects for rehabilitation and about what sanctions may be necessary to accomplish our goal of specific deterrence. It is my experience, however, that we very frequently mis-interpret the information gathered and draw unfairly negative conclusions.

1. Assessing The Prospects For Rehabilitation

If I have any picture of a Native accused, it is of a silent person, someone who says little or nothing to me, to psychiatrists, to custodians, to the court or to anyone. I regularly receive reports from numerous sources who all use, to varying degrees, the same descriptive words and phrases: uncommunicative, unresponsive, unable to offer insights into his actions, unwilling to confront his past, unwilling to explore his feelings towards himself or his victim or his surroundings. On occassion I have received reports indicating that an accused withdrew completely into himself and absolutely

refused to enter into any form of dialogue or respond to any efforts at communication. They are, without question, what we would call negative reports. In turn, they lead us to very negative conclusions about the prospects for rehabilitation. If he won't even explore why he did what he did, if he won't confront his personal demons or open up his feelings or acknowledge the sources of his anger, we assume that he is not interested in rehabilitation, not motivated towards helping himself. We then assume we are left with sentencing options that concentrate instead upon deterrence.

What if we are wrong in our interpretations of what he is and is not apparently willing to do? What if his refusal to cooperate stems from the fact that he objects to our processes of rehabilitation rather than the goal of rehabilitation? Further, what if that refusal was based on ethical objections? Would we not then have a very different picture of that individual, seeing not someone apparently devoid of concern for himself and others but someone who was able to resist all our imprecations by virtue of his allegiance to e thical precepts? Would that not alter our conclusions about the prospects for rehabilitation?

I was first alerted to the existence of such ethical precepts by the work of Dr. Clare Brant, a full-blooded Mohawk from the Tyendinaga Reserve in southern Ontario and a practicing psychiatrist. Everything I have seen in the

three years since being exposed to his insights confirms them: there are very pronounced ethical commandments which have traditionally forbidden Native people from doing many things which we expect all people would 'naturally' do. We have seen them only through our own rules.

One such rule requires that grief, anger and sorrow be quickly buried. They should not be expressed, for that only serves to burden the person who hears. They should not be explored or indulged privately, for doing so results in a lessened capacity to contribute the fullest energy, attention and skills which the hunter-gather society needed to maintain survival. Expressions of anger or criticism would serve only to create friction, a dangerous luxury to a people who required the maximum cooperation of all. Even the thinking of critical thoughts about others was to be avoided. Quite simply, the past was the past, and its negative parts were to be buried and forgotten as quickly as possible.

This set of rules results in a variety of responses. Amongst the Ojibway, for instance, it is improper to use the name of a family member who has died for six months after death, or to openly recount their lives for a year. It is not uncommon still for relatives to go into the home, remove and destroy clothes, keepsakes, pictures and momentoes, and to alter the configuration of interior walls so that there is virtually no trace of his physical existence. On one large

Reserve, band members took chain saws / and thoroughly destroyed a relatively new community coffee shop after a fight (which started inside) resulted in a killing; while outsiders could use the building materials for any purpose, the only one permitted band members was as firewood.

While such overt observances of these rules are declining, it remains a central tenet of life in many communities that it is wrong to speak of your hurts and angers and criticisms, wrong to indulge your private emotions. Instead, you bury and you carry on, resisting the backwards glance. I recall one teenage rape victim who refused to testify when her assailant finally came to trial more than a year after the event; her reason was simply that he should have paid his penalty by now and be getting on with his life. For her, it was simply too late to put him through it. The past was the past.

Asking a Native accused to explain what it was that aggravated him to such a degree that he attacked his victim is the subject of a special constraint, already referred to, which forbids the criticism of others. It extends to things both large and small, from how your spouse cooks potatoes to whether or not they are destroying the family through alcohol. It precludes the giving of advice or what we call constructive criticism. Each person is to be left entirely free to make his own choices. Even when those choices are obviously leading to harm it is rude and improper to interfere. If, as I have personally seen, your friend or brother is about to drive his boat onto a reef, it is your duty <u>not</u> to jump

up and warn him away. Similarly, in circumstances where we would spend hours telling our friend what car he should buy or diet he should try, such 'friendly advice' would be looked upon as a rude and arrogant interference in another's choices. I should add that this rule, which Dr. Brant terms the Ethic of Non-Interference, extends even to children, forbidding parents from telling their children when to go to school, what to eat, when to come home, that they must see the dentist, etc. Children too are to be left free to make their own choices, to learn from their own mistakes. It goes without saying that we interpret the absence of parental direction and control as signs of a lack of concern. I suspect that in fact most Native parents who see their youngsters getting into dangerous circumstances now wish they could interfere, but struggle with the force of their traditional prohibition. I recall one Native father who was asked by the judge what he did when he learned that his son had done a great deal of damage to the teachers lounge at 4 a.m.; his response was that he had hidden the boys shoes at night. That, to us, was as feeble a demonstration of care and concern as we could imagine, while to him it was probably further than he should have gone in interfering with his son's life. In many instances parents seem to welcome the intervention of the court, for it will do what they believe is necessary but what allegiance to traditional ethics forbids them from doing.

When their actions are seen in this light, we can see that we may be regularly misinterpreting why they do what they do and why they refuse to do what we expect. They are not

us. Their rules are not our rules. When they refuse to jump into group therapy, to delve into their pasts, to recreate their emotional states and their trains of thought, that refusal stems not from an unwillingness to change things for the future but from a cultural prohibition against both reliving the traumas of the past and burdening others, even professional helpers, with their private woes. As one young Native boy told the court only recently when asked why he had not taken advantage of all the therapeutic resources offered him in earlier placements: "It's not that I'm afraid or embarassed. It's just that it isn't right".

The degree to which such things were not considered 'right' is revealed by two dispute-resolving mechanisms from traditional times which have been described to me. The practice in one Inuit village was to call the entire village together, and to put the actual event foward as a <u>hypothetical</u> event which might happen some time in the future. All people, including the miscreant and his victim, were required to put forward their views as to how things might be handled peacefully and properly were the situation ever to arise. There was no blaming, no pointing of fingers, no requirement of explanation, nor was there ever any discussion, much less imposition, of either punitive or restitutionary response. At one Ojibway Reserve in my District similar dynamics governed. While the miscreant and his victim were summoned before an Elders Panel, there was never any discusiion of what had happened and why,

of how each party felt about the other or of what might be done by way of compensation. Nor was there any imposition of punishment. Each party was instead provided with a counselling Elder who worked privately to 'cleanse his spirit'. When both counselling Elders so signified by touching the peace pipe, it would be lit and passed to all. It was a signal that both had been 'restored to themselves and to the community'. If they privately arranged recompense of some sort, that was their affair. As far as the community was concerned, the matter was over. While I have not learned what the private counselling did consist of, I have been told that it did not involve retrieval and re-examination of the past in either its factual or emotional facets. It concentrated upon the future, and its spiritual component was central.

As a footnote, such ethics also cast the behaviour of Native victims in a very different light. Refusal or reluctance to testify or, when testifying, to give anything but the barest and most emotionless recital of events, may of course have been prompted by fear of the accused, by fear of the court, by love for and forgiveness of the accused or by any other such 'sensible' reason (including the possibility, of extreme rarity in my experience, that they are uncomfortable because they are lying). Another reason, culturally foreign to us, could be that giving testimony face to face with the accused is simply considered wrong. It was not part of the traditional processes described above, where in fact every effort

seems to have been made to avoid such direct confrontation. I recall one Indian woman who repeated her entire story of abuse to me in vivid detail before going into court and then asked me to do whatever I could to have the court send her very dangerous assailant to jail for as long as possible. Ten minutes later she took the witness stand and absolutely refused to say anythingof an accusatory nature. When such witnesses regularly ask why they have to repeat their stories in court when they've already told 'us' (meaning the police and the Crown), I have come to suspect that it's more than fear or embarassment at work. I suspect instead that it is perceived as ethically wrong to say hostile, critical, implicitly angry things about someone in their presence, precisely what our adversarial trial rules have required since Sir Walter Raleigh's defiant dare. In fact, we have taken his legal challenge into our daily lives, exhorting each person to open up with the other, to be honest and up front, to get things off our chests, etc., all of which are, to traditional Native eyes, offensive in the extreme. When they refuse to follow the exhortations of our rules, we judge them as deficient in rule-obedience or, worse still, rule-less. In our ignorance we have failed to admit the possibility that there might be rules other than ours to which they regularly display allegiance, an allegiance all the more striking because it is exercised in defiance of our insistent pressures to the contrary.

I therefore urge great caution whenever we are faced

with descriptions of Native accused filled with words starting with 'un-'. We may well be faced with someone unwilling, unresponsive, uncommunicative etc. because he truly doesn't care what happens to him or to anyone else; it is at least just as likely, however, that he is acting as he is out of long-established notions of propriety which forbid his acquiescence to our recommendations or requirements and that he truly does want to change his ways and avoid repeating his past misconduct.

I earlier mentioned that on rare occassions I have received reports that an accused had withdrawn completely into himself and absolutely refused to enter into any form of dialogue. Dr. Brant terms this phenomenon the Conservation-Withdrawal Tactic, and its rule stipulates that when faced with unfamiliar situations the wisest response is to step back into yourself to conserve both physical and psychic energy and to study all surroundings with great care until they are familiar enough that you can participate in confidence. It was a bush survival strategy where not acting was necessary until the choice of action was carefully made. It is a learned response which varies significantly from our own. Just as a great many lost white hunters react with a frenzy of unproductive, energy-consuming and potentially dangerous activity, so too we frequently respond to the stress of a cocktail party full of strangers by a frenzy of blabber. The Native, by contrast, will retreat to a wall and observe until the stress of unfamiliarity subsides and he can join the procedings with confidence.

It is not hard to imagine the stress felt by a Native youngster who is arrested and flown to a detention facility in some faraway, non-Native community. On rare occassions the withdrawal is so complete that psychiatric examinations are quickly arranged. According to Dr. Brant, there have been significant mis-diagnoses made wherein people experiencing intense conservation-withdrawal have been diagnosed as psychotic or schizophrenic, simply because we fail to recognize learned responses other than those we learned. Their apparently catatonic state is not a symptom of schizophrenia nor is it a psychotic episode; it is a learned response which will pass in time without massive pharmaceutical intervention.

The point I wish to make is that refusals of Native people to do what we assume all truly repentent people would do if they were genuinely motivated towards rehabilitation should not automatically lead us to the conclusion that they are remorseless individuals with no desire for rehabilitation. Native refusals can just as easily be strong indicators that they maintain a determined allegiance to ethical considerations, amongst which may well be a heartfelt desire to see to it that they never repeat their anti-social act.

It should be notedin passing that a number of Native communities are now taking revolutionary steps to break with some of those traditional ethics. The Alkalai Lake Reserve in British Columbia is perhaps the most famous illustration. Their first enemy was alcohol, but in the process of

receiving alcohol treatment they began to encourage each other (and other Bands across Canada and the U.S.) to open up to each other, to share their hurts and their sorrows, to express their discontentments as well as their dreams. The second enemy was sexual abuse and its legacy of pain, suffering and repeated abuse. The two-segment Man Alive series on C.B.C. Television showed them gathering as a community to speak of such hidden things, to comfort each other and to forgive and heal each other. While most of Canada may have been shocked at the extent and origins of the abuse, the even more startling aspect was, for me, the degree to which such efforts contravened the traditional rules requiring suffering in silence and putting it all behind you. A Reserve in the Kenora District played a variation on the same theme several months ago when they held a three-day community session which both encouraged and instructed parents on the proper kinds of interference in the lives of their children which year-round life in multi-family communities now requires.

What strikes me regularly is the possibility that these tiny communities may not only change from the old ways in an historically very short period of time, but that they will move well beyond the lip service which, by and large, is the extent of our observance of rules requiring full and honest dsclosure of our emotional burdens. Because they are real communities, and because the community still holds immense power over individual decisions, there is every chance that these 'new' ethics may become powerful ethics

in fact practiced by the majority. If so, they may well get at the issues of domestic and sexual violence in their communities faster and more thoroughly than we will in ours. It might serve us well to watch them closely in an effort to study the most efficacious response to such phenomena, for I suspect that, left to their own devices, they will chose a more strongly rehabilitative, less punitive, approach. And, like it or not, it is my sense that in most isolated Reserves very little comes to the attention of the court in this context.

2. Assessing Specific Deterrence

This too is a complex area, not only for those of us in the court party but for the communities themselves.

In traditional times, such deterrence was accomplished without much man-directed intervention. In the first place, the social group was the extended family, with the result that any harm done was harm to family members. Secondly, Mother Nature was the great enforcer, for anti-social conduct almost by definition diminished the capacity of the group to maintain bare survival in the woods. If man failed, Mother Nature punished. The over-riding threat was banishment from the group, banishment into the wilds where, without the help of others, there was every likelyhood of death. It was critical to each person that he maintain the welcome of the group, for without it he was lost.

What has caused great turmoil in many northern Reserves

is the fact that the old deterrence no longer seems adequate. People no longer need the group in the same essential way they once did, for their physical survival. Nor is the social context restricted to a small group of blood-relatives, for today's northern Reserves have populations up to 1500 and are made up of many families, some of whom are mutually antagonistic. For a great many reasons too numerous and too complex to go into here, the incidences of anti-social behaviour have escalated dramatically, sometimes to crisis proportions (one court docket had 222 Criminal Code charges against 129 people,just over 10% of the entire community's population). Some Reserves have adopted a deterrence regime whose harshness I am uncomfortable with, while others emphasize rehabilitation and counselling almost exclusively. They are all experimenting, chosing different paths. They retain their threat of banishment, and use it when all else fails.

This is not to suggest, however, that specific deterrence can only be accomplished through the threat of fines or jail. I suspect that most such tiny, isolated communities promise deterrence mechanisms largely unavailable in our larger towns and cities.

A number of Elders have told me that before the courts came they kept order through gossip. I am coming to understand that being talked about negatively hurts them, in their

context, far more than it does me in mine. Even though people no longer count on each other for physical survival, there is still a remarkable sense of each person being important to the group, with its corollary sense of shame whenever an individual lets the group down. In such tiny communities no indiscretion goes unnoticed, no anti-social act undiscovered (in fact, regardless of what the CRTC stipulates, community radio stations routinely broadcast the most personal gossip imagineable, far more interesting to the listening audience than soap operas!). They have been taught to care deeply about what others think, while we are regularly instructed to ignore what others say. We do not fear rejection by the group in the same way, because we can always move to a new city, make new friends, start all over again. We know that we may be punished by the court, but we also know we will never be banished. Further, our indiscretions and criminal acts , while potentially the subject of wide media coverage, are in all likelyhood going to be known only to a few, and a few strangers at that.

I think we forget, or fail to recognize, that a Native person who offends his own tiny community and is taken to court (or before Council, which may be more intimidating still) very frequently feels degrees of personal shame and of fear about losing his community's welcome which in themselves stand as significant deterrents to repeated misbehaviour. They know that their acts will be remembered by all and be the subject of comment by all (not to his face,

of course) for long into the future.

I suspect we also forget the degree to which the misbehaviour of one person brings shame upon his whole family. The very fact that they must bear his shame adds to the regret and discomfort of the individual who caused it all. He knows that wherever his family members go, they too will be gossiped about.

One illustration brings this dynamic into clear focus. On one Reserve a drunken young man passed out while slowly driving his parents' car down a gravel road. The car went into a steep ditch and rolled. A friend in the back seat was thrown forward out an open window and then crushed by the rolling car and killed. The driver was charged with impaired driving causing death, an offence which in southern centres routinely attracts sentences ranging from 18 months to three years, almost regardless of the situation of the individual accused.

That particular Reserve has a Justice Committee which regularly speaks to me and to the court on the issue of sentence. Their primary focus is on rehabilitation, but they agreed that there had to be a jail term here to highlight the danger of drinking and driving. They advised me that they thought our southern sentences much too severe, and that they were prepared to support a sentence of six months. They also advised that the accused was agreeable as well, and would enter a guilty plea. As I soon discovered from the defence counsel, however, the accused was not agreeable. He

had no memory of driving and suspected that the third boy in the car was trying to blame him. He wanted, quite properly, to require the Crown to prove its case.

What is of interest here is that it made little difference to the Justice Committee whether we had charged the right boy or not. What was important to them was that we had charged the son of the family who had provided the car to three intoxicated youngsters in the first place. Their son should go to jail, driver or not, because that would punish them, the parties they considered primarily responsible. Just as that family already bore the shame, so too should it bear the punishment.

At trial it was clearly proven that the accused boy had in fact been the driver, and he was convicted. His sense of shame, and his family's, was palpable. He would carry that shame, as would they, for the rest of his days. The accident scene now boasted a huge sign in english and syllabics saying 'Don't Drink And Drive', a sign which that boy would have to pass every time he went out to the airport or over to another part of the community. He would, quite literally, be forever reminded, as would all other people travelling that route. His name was not on it, but everyone would know. There are white crosses at accident sites now in other communities. Jail seemed an almost inconsequential burden compared to having to live out his life with that sign, especially when he knew he had visited his family with that same burden.

Even when no signs are erected, there are ways in which community reaction can contribute importantly to specific deterrence. Probation terms requiring community service work appear to be effective not only because of the punishment aspect of working for free but because being seen performing it prolongs each individual's public exposure as someone who has injured his community. I have been told that they are very conscious of being seen, of the talk continuing. Coincidentally, community service work may well asist in individual rehabilitation, in that it permits an individual to be seen paying back his debt, at the end of which both he and the community can close the books and marked them 'debt paid'. This too is important to Native people. They feel obliged to acknowledge their misbehaviour and they are anxious to be given an opportunity to atone for it so that it can be put behind them and their welcome can be restored. In this respect it is of more than passing interest to note that they <u>want</u> to plead guilty when they are. Amongst the Mohawk, one of the most serious of crimes is lying, which would include not acknowledging those acts of which you were properly accused. Three convictions for lying results in automatic banishment, and convictions follow you for life. Pleading 'not guilty' is, to them, a lie because it means a denial of the truth of the allegation. For us, of course, a not guilty plea does not mean 'I didn't do it'; it means instead that we require the crown to prove it, as is our right. It is little wonder that there are so many guilty

pleas from Native accused, for it is likely that the offence with which they are charged is less serious to them than lying about their involvement in it, precisely what a 'not guilty' plea would represent for them. They welcome the opportunity to come to court, to confess their transgressions and to do their penance, for in this way they can earn the continuing welcome of their community. To deny their involvement and to successfully escape penance would bring upon them nothing but disdain, likely a more severe disdain than the original crime would have produced. They do not understand the thinking behind our right to enter a plea of 'not guilty', do not understand how it can co-exist with our Christian rule that requires confession and acknowledgement before there is the possibility of forgiveness and redemption. Put in that context, quite frankly, neither can I!

This is not to say that all Native people approach things in the way I've described them. A great many have been off to university or have lived for considerable periods of time off-Reserve. Many understand our system perfectly. The fact remains, however, that a great many are still puzzled by it, see our rules as perplexing and sometimes contradictory. When they do not act in automatic conformity with them we should not interpret that inability or outright refusal as a sign of an anarchist existence. They have their own notions of propriety which are several thousand years old, and they differ markedly from ours in some very fundamental respects. There is even a chance, much as we might resist admitting it, that some of their rules show a humanity and a respect for the integrity and rehabilitative

potential of each person which we would be well to emulate.

I hope I may be forgiven that editorial comment, but I'm growing a little weary of our assumption that we have little to learn from what we call a 'primitive' society. I no longer hold the view that their survival as a people requires that they 'catch up' to us, adopt all of our ways, and become indistinguishable from us. There is no doubt that they are searching for new ways in recognition of the fact that rules appropriate to the survival context may be wholly inappropriate now. When they refuse, however, to adopt some of our ways, perhaps we should take heed. What they ultimately do create will be new, and it may well be superior in many respects to what we are doing now. There is no reason that we cannot learn from each other.

We should also be alert to the fact that for many Native people incarceration carries consequences more burdensome than experienced by non-Natives. This fact was recognized by the Ontario Court of Appeal in R.v. Fireman, originating from the District of Kenora and argued by a Kenora lawyer. There is often a language problem which results in the accused being held in a state of de facto isolation. Being held indoors amounts to a special deprivation for many Native people, as does the fact that virtually all recreational and rehabilitative programs may be completely foreign and incomprehensible. Even the food is likely to be strange and unsatisfying. We must also remember that for many Native people the practical impossibility of family contact, either in person or by telephone, adds an extra sense of deprivation and loss, especially when, as is the case with

a great many Native people, close involvement with every member of the extended family is the most important enterprise of life. Even the degree to which they worry about the worry which their families feel adds an extra burden. Their absence means that others will have to stack the wood and haul the water, check the traps etc., and they feel great shame that they have added to the burdens of others. For these and other reasons, it is my conclusion that for a great many Native people each day in jail poses hardships and occassions feelings of grief and sorrow which would not be experienced to the same degree by their non-Native cell-mates. Specific deterrence through the use of jail terms may not, in other words, require the same length of sentence for many Native accused. There are others of course who are largely institutionalized from past jail terms, and others who, disturbingly, commit crimes in the hope of escaping intolerable community dynamics and going to a place where they are at least well-fed and safe. I merely wish to indicate that when we look at jail as an instrument of specific deterrence that we also look carefully at the individual we propose sending there, for very frequently even a short stay will have a very substantial deterrent effect simply because of certain specific factors in his Native background.

B. ASSESSING THE OFFENDER'S COMMUNITY AND FAMILY CONTEXT

It is also our duty to examine the context in which the offence took place and to which the offender is likely to return. An accurate reading of that context is required before

we can hope to assess the opportunities for rehabilitation. Acknowleding that it may be a contentious proposal in some quarters, I also suggest that the family and community context peculiar to the accused may be an important element in considering the issue of general deterrence. I will canvass this latter contention first.

Conventional wisdom has it that general deterrence focuses on the Canadian community as a whole. It speaks to national concerns, expresses national revulsions requiring national denunciations and sets national standards. I have a problem with that in an Ojibway-speaking community 300 air miles north of Thunder bay. It is my sense that its inhabitants are not in the least touched by a Globe and Mail report of a deterrent sentence announced by the Court of Appeal in Toronto. They are, however, immediately and deeply affected by any sent- handed down in their own community. In fact, it is precisely the isolated and self-contained nature of those communities which guarantees that measures aimed at effecting general deterrence will have that intended effect.

The case involving impaired driving causing death which I earlier mentioned provides a good illustration. Every person in that community knew what had happened. They witnessed the results of drunk driving first-hand for, as is their custom, they all went to the funeral. They did not need explosive headlines, for they saw the body. They did not need court-inspired depictions of the tragedy, for they watched the dead boy's family weep, and joined in the weeping themselves. In

short, there was no court denunciation which could come close to telling them what they already knew, what they already felt, what they had already learned first-hand. In the year it took to get that case to sentencing, impaired driving charges in that community had dropped from 16 to 1, and that involved a ski-do. They are, because of their size and their isolation and their sense of community, capable of learning lessons from events themselves, and so have less need of the court's drafting of responses aimed at making such lessons clear. In the result there is, in my view, much less need to do something I find very difficult to do, sacrificing an individual and his family for the sake of getting a message strongly out. I acknowledge that it has the <u>appearance</u> of sending different signals to Native and non-Native communities. I have even heard accusations that it means that the court takes the loss of an Indian Life less seriously that the loss of a non-Indian life. I proposed to the court in that particular case a sentence of three months jail, plus lengthy probation with various counselling and abstention terms, a proposal which the court accepted. Even then there was immense regret in the community as the young lad was taken into custody. They felt that he had learned his lesson, that in the year since the tragedy he had demonstrated his commitment to abstention and to becoming an involved and contributing member of the community, and that imprisonment would serve no purpose whatsoever. It appearedthat even members of the victim's family shared those sentiments.

In that particular community I was also heavily influenced

by the fact that the community leadership feels a very distinct responsibility for each person. When they get into difficulty, the Band assists. When they cause difficulty, the Band intervenes. Every arrested person is taken before Chief and Council. I don't know what happens there, but it seems to work, for the court dockets in that community are dramatically lower than other Reserves of equal population size, economic opportunity etc. When they tell me that their activities with a certain accused or family seem to be working, I believe them, for they are not reluctant to come forward and state to the court that other parties refuse their help, cannot be controlled and must be removed to jail as a regretted last resort. The simple truth is that an active and interventionist Chief and Council can accomplish a great deal more than all the social agencies in our towns and cities put together. In the first place, they know each accused, they know his family history, they know the trials and tribulations he has faced and must overcome. Secondly, they have a personal commitment to his rehabilitation for they too must live with the results if they fail. Thirdly, the accused himself has a number of special reasons to listen to them, not the least of which is that they control virtually all allocation of jobs, housing and welfare benefits. When they tell the court they believe they can work with him, and when the accused indicates his willingness to abide by their direction, it is likely that both can be counted upon to follow up. In short,

there are many Native communities where the chances of successful rehabilitation are much enhanced by dynamics which do not exist in ours. There are others, of course, where such intervention does not yet exist, where they prefer to have the court intervene or where, unfortunately, the social chaos (or political in-fighting) guarantee that virtually nothing of any substance gets accomplished. Each community requires individual and careful scrutiny. If forced to generalize, however, I would have to guess that the opportunities present for successful rehabilitation in such communities exceed those available in ours. In making that guess, I also rely heavily on the central role of family earlier referred to, on their determination not only to avoid further loss of face but also to see their good name restored.

The unique nature of northern Reserves also promises that general deterrence which requires jail terms can frequently be accomplished with somewhat lighter terms. The very fact of removal is itself significant, and the departure of the police airplane with the accused waving from a window often takes on the character of a community spectacle. Everybody knows he has gone. Everybody senses the shame of his family. Everybody knows that now others will have to perform whatever chores he usually contributed to family well-being. Just as importantly, his extended family will miss him sorely, and those who are left behind will see that grief and determine not to be the cause of such grief themselves. While the length of the sentence of

course matters to the accused and his family, I'm less certain that its adds significantly to general deterrence. It is the simple fact of removal which seems to have the greatest impact. Lengthy sentences, save where required for community protection from uncontrollable accused, seem to be viewed as exercises in gratuitous punishment serving little useful long-term purpose.

As a final matter, I think that we should be alert to the fact that many Native communities seem to be prepared to take substantial risks for the sake of making efforts to assist each accused with his rehabilitation. While our cities regularly show vociferous protest at proposals to establish group homes or half-way houses in residential neighborhoods, Native communities frequently show themselves more than ready to welcome back even those who have done the most monstrous harm. Many genuinely feel that an individual's violent act is a sign that they, as a community, have failed to provide him with the guidance and nourishment he required. In that sense they seem more than ready to pay a price for what they perceive on some level to have been a community failure. At the very least, they are often prepared to take significant risks with dangerous people, premised on the hope that they can turn them around, help them find themselves and, in the phrase earlier quoted, restore them to themselves and to the community. If they are willing to take such risks, I have some difficulty convincing myself that I have a duty to interfere. It is an attitude of community responsibility which I find admirable in the extreme.

C. CONCLUSION

Sentencing is, at all times, a complex process which requires close scrutiny of each individual accused and of the context from which he came and to which he will return. For the foreseeable future it is not an exercise involving the rote recitation of certain formulae and the selection of a standardized response showing systematic conformity. It instead borders on an art wherein the ultimate sentence imposed reflects the court's selection of the particular instrument best suited, in all the circumstances, to the attainment of essential and lofty goals.

Where those circumstances involve Native accused and Native communities, very different instruments may well show themselves as being better suited to the attainment of those goals than the instruments we are accustomed to reaching for. Our selection process demands that we pay close attention to the goals of sentencing, and to the reality of each individual and his community. Accurate pictures of that reality will require that we do our best to discard our own cultural filters and to see things through theirs. We should as a matter of routine expect them to hear different commands and, equally, not to hear many of ours. When they appear to refuse to follow ours, we must learn to ask where that refusal stems from. The handy explanations we are used to in dealing with our own accused may form no part whatever of their decisions. In the same fashion we should

be alert to the possibility that their unique family and community contexts may provide opportunities for attaining the goals of sentencing which are not present in either kind or degree in our communities.

Finally, it is my suggestion that we not be in the least professionally discomfited if, in the end, the final quantum of sentence varies dramatically from that generally imposed in the rest of Canada. Our task as professionals is not uniformity of quantum but uniformity of goal-attainment. Natives and non-Natives alike deserve nothing more and nothing less.

POSTSCRIPT

It is my hope that I will soon find a publisher for a book-length investigation of the hunter-gatherer culture which survives in northern Ontario, titled "Dancing With A Ghost: Exploring Indian Reality", which I am in the process of completing.

I welcome all contributions, criticisms, anecdotes, thoughts and suggestions.

SENTENCING NOW AND IN THE FUTURE

CHAPTER 3

PLEA BARGAINING

Material prepared by Douglas Hunt,
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March 3 & 4, 1989

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PLEA BARGAINING - THE CANADIAN POSITION

A Introduction

The practice of plea bargaining has been the subject of intense study in Canada during the past several years. Both the Canadian Sentencing Commission[1] and the Law Reform Commission of Canada[2] have commented upon it in considerable detail. While each of these commissions has come at the issue from a slightly different perspective and has made somewhat different recommendations with respect to its future, they are in agreement that plea bargaining serves a legitimate purpose within the criminal justice system in Canada. They have separately suggested that a realistic approach to the reform of the process requires the institution of methods that would enhance the efficiency, accuracy, visibility and accountability of plea bargaining decisions. Both have rejected the abolition of the practice.

A debate with respect to the issues raised and the recommendations made by the two commissions is just now beginning. It seems likely that the majority of Crown and defense counsel and the majority of judges across the country will endorse the general proposition that plea bargaining has an important role to play in the Canadian criminal justice system. However, it seems much less likely that there will be any substantial agreement about the specific proposals for reform

that have been made. I suspect that one response that will be urged quite vigorously by many of the stakeholders within the system is: "If it isn't broken, don't fix it." On the other side, proponents of the positions taken by the commissions will be quick to point out that while the practice of plea bargaining may not be completely broken, it is in need of a major overhaul if it is to function in a respectable way in the future. The purpose of this paper is to briefly examine the major recommendations that have been advanced.

B Proposals of the Canadian Sentencing Commission

Behind the recommendations of the Canadian Sentencing Commission (hereinafter the CSC) lies the concern that the present unstructured plea bargaining process has the potential to gravely undermine the relationship that should exist between the seriousness of actual criminal behaviour and the way in which it is reflected in a criminal offence or in a sentence. It argues that the objective of achieving real and equitable sentences is jeopardized by an informal practice that is not open to public scrutiny and about which very little is known. The CSC identifies proportionality, equity and certainty as goals to be achieved in sentencing reform and it regards the informal criminal justice system which is created by plea negotiations as very likely being inimical to those goals.

One can not seriously take issue with the CSC proposition

that informal and unstructured plea bargaining may pose a threat to a rational and principled criminal justice system. Concern over such a threat may be all the greater when it is noted that approximately 90% of all criminal charges are resolved by way of a guilty plea. However, the CSC concedes that there is actually insufficient knowledge about the effects and implications of the present plea bargaining process to warrant any drastic changes at this point in time. One might argue that an inference to be drawn from the lack of sufficient evidence justifying major reform of the process is that, notwithstanding the concerns that may exist, the practice of plea bargaining has not, in fact, compromised the integrity of the Canadian criminal justice system. For if it had, one would expect to be confronted with an abundance of evidence to that effect.

The Criminal Code contains no definition of plea bargaining. The CSC concluded from its research that the term is commonly used to describe a wide variety of activities on the part of the players in the justice system. For the purposes of its examination the CSC drew a distinction between three different types of activity which are normally considered to be part of the plea bargaining process:

"Charge Bargaining:

a) reduction of the charge to a lesser or included offence;

b) withdrawal or stay of other charges or the promise not to proceed on other charges;

c) promise not to charge friends or family of the defendant.

Sentence Bargaining:

a) promise to proceed summarily rather than by way of indictment;

b) promise of a certain sentence recommendation by Crown;

c) promise not to oppose defence counsel's sentence recommendation;

d) promise not to appeal against sentence imposed at trial

e) promise not to apply for a more severe penalty;

f) promise not to apply for a period of preventative detention under s.688;

g) promise to make a representation as to the place of imprisonment, type of treatment, etc.;

h) promise to arrange the sentence hearing before a particular judge.

Fact Bargaining:

a) promise not to "volunteer" information detrimental to the accused (e.g. not adducing evidence as to the defendant's previous convictions under ss.237 and -1 (sic) of the Criminal Code;

b) promise not to mention a circumstance of the offence that may be interpreted by the judge as an aggravating factor."[3]

The starting points for the CSC in its consideration of the issues relating to plea bargaining were the crucial questions of visibility and accountability. In its view the maxim that "not only must justice be done but it must also be seen to be done" gives rise to the need for greater visibility of the plea bargaining process. Only through the enhancing of the visibility of the process can public confidence be maintained.

At the very least this would require the disclosure in open court of the basis of the decision making process by which an agreement between counsel was reached.

Accountability, on the other hand, deals with the quality of the decisions that are made during the plea bargaining process. The CSC notes that there is a significant lack of accountability involved in the present process. This lack of accountability is facilitated, in part, by the low visibility of the process. The chief mechanisms controlling the process are the rules provided by the governing bodies of the legal profession (with respect to defense counsel), the guidelines and directives of the federal and provincial Attorneys General (with respect to Crown counsel), and the pronouncements of the courts.

The CSC points out that section 534(4) of the Criminal Code, which empowers the sentencing judge to accept a plea of guilty, with the consent of the prosecutor, to an offence with which the accused has not been charged but which arises out of the transaction that lead to other charges being laid, gives the court the ultimate power to ensure that plea discussions are consistent with the proper administration of justice. However, the power of the court under section 534(4) can be completely neutralized by the simple expedient of a new charge being laid (i.e.: the lesser or included offence) and the original charge being withdrawn. The court must then accept the guilty plea to the lesser or included offence (assuming the facts support the charge and the accused understands the effect of the guilty plea) since it stands alone as a separate charge.

The CSC noted that research conducted for it, with respect to the effectiveness of formal regulations governing lawyers operating within the criminal justice system, concluded that guidelines lack the enforceability necessary to be effective deterrents against improper plea bargaining practices. However, among Crown and defence counsel and the judiciary there is generally little support for either legislative control or legislative prohibition of plea bargaining.

The main arguments against the abolition of the practice are: 1) it is beneficial in that it facilities the expedient disposition of criminal matters; and 2) attempts to ban plea bargaining are likely to succeed in merely moving the practice to a different point in the criminal justice process (e.g. judicial involvement in, and control over, sentence bargaining). The CSC concluded that inasmuch as criminal justice systems will always generate and perpetuate discretionary decision-making as a method of achieving many varied and conflicting goals, and since plea bargaining appears to allow and facilitate the accommodation of these multiple ends, the practice ought not to be abolished. In the Commission's view it is far more realistic to enhance the visibility and accountability of the process.

In pursuance of this object the CSC made recommendations in a number of areas.[4] The principle ones are summarized below.

The Victim

The Commission noted that victims generally felt excluded manipulated and even abused by the criminal justice system. The present plea bargaining process was viewed as creating a potential to obscure, for victims, the visibility and accountability of sentencing dispositions. In addressing this concern the CSC considered and rejected the proposition that victims should be accorded a separate status in sentencing proceedings. It was the Commission's view that the interests of the victim in plea negotiations ought to continue to be represented by the Crown. However, it felt that there was considerable room for improving communications between Crown counsel and the victim during plea negotiations. The Commission recommended that provincial and federal Attorneys General develop guidelines which would direct Crown counsel to keep victims fully informed of plea negotiations and sentencing proceedings and to represent their views.[5] In addition, where possible, Crown counsel ought to be required to receive and consider a victim impact statement prior to agreeing to a negotiated plea.[6]

The Offender

Surveys conducted for the CSC indicated that offenders play either no role or an insignificant role in the plea bargaining process. In addition, a significant percentage of offenders

advised that no one explained the plea bargaining process to them. The Commission considered the advisability of a code of professional conduct for defence counsel involved in plea negotiations. However, it considered that the recommendation of such a code was outside of the terms of its mandate and that the enactment of such a code was beyond the jurisdiction of the federal Parliament. In order to address the issue of the visibility of plea bargaining for the offender, the Commission recommended that the sentencing judge inquire of the accused whether the accused understands the plea agreement and its implications. Where the accused does not understand the judge should have the discretion to strike the plea or sentence.[7]

The Police

The CSC concluded that the charging practices of police, in the sense of multiple or over-charging, was a highly relevant issue insofar as the accountability aspect of the practice of plea bargaining is concerned. Surveys indicated that a large percentage of professionals in the criminal justice system believe that the police generally lay more or more serious charges in order to gain a stronger position in plea negotiations.

Consequently, the Commission recommended that federal and provincial Attorneys General collaborate in the formulation of standards or guidelines for police respecting over-charging or

inappropriate multiple charging.[9] In addition, it recommended that serious consideration be given to the institution by federal and provincial Crown authorities of a formalized screening mechanism to permit the review of charges by Crown counsel prior to their being laid by the police.[9] Finally the Commission recommended that police forces develop their own internal review mechanisms to enhance the quality of charging decisions and to discourage the practice of laying inappropriate charges in order to gain leverage during plea negotiations.[10]

Crown Prosecutors

As the ultimate discretion with respect to the prosecution of criminal charges rests with Crown counsel, these individuals have the greatest impact on the visibility of the plea negotiation process both for the general public and the victim. The CSC made two recommendations to enhance the visibility and accountability of the exercise of prosecutorial discretion. The first is that prosecutorial authorities establish guidelines restricting and governing the power of Crown counsel to reduce charges in cases where there is evidence available that is sufficient to prove a more serious offence.[11] The second, and broader, recommendation is that prosecutorial authorities formulate and attempt to enforce guidelines respecting the ethics of plea bargaining.[12]

The Commission rejected the idea that the plea negotiation process be formalized and that written plea agreements be made mandatory. However, it recommended that a mechanism be developed whereby Crown counsel be required to justify in open court a plea agreement reached in private or in chambers unless, in the public interest, such justification should be done in chambers.[13]

The Judiciary

The Commission has noted the concern that active judicial participation in plea bargaining erodes the judge's role as an objective, non-partisan arbitrator. As a consequence it recommended that the trial or sentencing judge never be a participant in the plea negotiation process. That is not to say that the judge may not indicate in chambers the general nature of the sentence that is likely to be imposed in the event of a guilty plea.[14] In addition, the CSC recommended that the Criminal Code be amended to expressly provide that the court is not bound to accept a joint submission presented by the parties with respect to a particular charge or sentence.[15]

In light of the provision relating to pre-hearing conferences set out in section 533.1 of the Criminal Code, the Commission felt the need to specifically address the situation of a plea agreement reached during the course of such a conference.

It recommended the development of a mechanism to require full disclosure in open court of the facts and considerations which formed the basis of an agreement, disposition or order arising out of a pre-hearing conference.[16]

C Proposals of the Law Reform Commission of Canada

The Law Reform Commission of Canada (hereinafter the LRCC) first considered the subject of plea bargaining more than a decade ago.[17] Earlier this year it released a draft discussion paper[18] on plea discussion and agreements which represents a cautious re-examination of the area necessitated by the significant changes that have occurred in the Canadian criminal justice system during the intervening years. The enactment of the Canadian Charter of Rights and Freedoms; the expansion of provincial legal aid schemes, with the consequent increase in the availability of legal representation; and the development and formalization of pre-trial conference procedures have changed the nature of our criminal justice system and, in the view of the LRCC, require that a more detailed exploration of some of the problems associated with plea bargaining be undertaken.

The LRCC is concerned, as it was in its earlier discussion of this subject, that plea bargaining represents a shadowy justice system unto itself that threatens to pervert the criminal process and diminish public confidence in it. In the opinion of the Commission, "Justice should not be, and should not be seen to

be, something that can be purchased at the bargaining table."[19] However, like the CSC, the LRCC does not advocate the abolition of the practice. Rather, it regards plea bargaining as a process that can, if practiced properly, be an expression and merging of the complimentary principles of efficiency and restraint.

In placing a premium on efficiency the LRCC is quick to point out that efficiency does not simply mean expediency. In its view the principle of efficiency demands accuracy. In the context of plea negotiations this means that any offence to which an accused person pleads guilty must realistically reflect his or her criminal conduct. Further, any sentence that a prosecutor agrees to recommend must be justifiable in accordance with sentencing principles.

The LRCC has made recommendations directed at several areas of concern. These include: the need for more openness; the need for judicial supervision; ensuring voluntariness of pleas; verifying the accuracy and appropriateness of pleas; requiring equal treatment of accused persons; and, enforcing plea agreements.[20]

Openness

As did the CSC, the LRCC views the low visibility of plea bargaining as the most serious deficiency of the present practice. The LRCC specifically agrees with the CSC proposal

requiring that the elements of any plea bargain, and the reasons behind it, be disclosed in open court.[21] However, the LRCC has noted that openness may not be absolute and it would make an exception for those situations where full disclosure in open court is likely to result in serious harm to the accused or to another person.[22] This exception is somewhat more limited in its scope than that proposed by the CSC.[23]

Judicial Supervision

The LRCC feels that a statutory requirement for the justification of plea agreements is necessary. It sees this as but one part of a package of measures that would, ultimately, require much greater judicial supervision of the actions of the Crown and defence counsel in plea negotiations.

The concerns giving rise to the needs for such supervision are twofold. First, plea bargaining as presently practiced effectively enables the prosecutor to assume the adjudicative and dispositional functions of the court. The Commission acknowledges that this argument may well be something of an exaggeration since it is clear that the court is not bound by any agreement between the prosecution and the defence concerning sentence. Second, plea bargaining may put defence counsel in a position of potential conflict. This argument suggests that in order to ensure a good working relationship with Crown counsel, defence counsel may have to ensure that, over time, a certain proportion of his or her clients pleads guilty. The Commission acknowledges that the reality of this hypothesis remains unclear.

In light of the concessions made by the LRCC concerning the underlying reasons why, in its view, there is a greater need for judicial supervision of the plea bargaining process, I suggest that it is appropriate to question the conclusion reached by the Commission. Absent more cogent reasons than those advanced to date by the LRCC, there is little justification for enacting legislation that has the potential to place the judiciary in the midst of a process that is not consistent with the judicial role of an impartial arbiter. The LRCC is in accord with the views of the CSC that judicial participation in the "give-and-take" of plea bargaining would be wrong. If so, substantial justification ought to be required before bringing the judiciary closer to that point by imposing upon it the obligation of overseeing the process.

The LRCC has recommended that a judge who has been informed that a plea agreement has been reached between the Crown and the defense, should question the accused person, in open court, to determine whether he or she understands the nature and consequences of the agreement.[24] If a plea agreement contemplating a disposition departs significantly from one that would otherwise have resulted upon the accused pleading guilty to the same offence in the absence of an agreement, the Commission recommends that no effect should be given to it.[25] As a complement to this, it also recommends that no prosecutor should participate in any such plea agreement.[26]

Voluntariness

The Commission has concluded that there is a need to ensure that negotiated pleas have been made voluntarily in the sense that they were not extracted by means of any "improper inducement". It recommended that the term "improper inducement" be defined to cover a wide range of activity on the part of both Crown and defence counsel.[27] The activity set out in the suggested definition is of the type that would necessarily render suspect the genuineness or factual accuracy of the plea. The main concern identified by the Commission is that offenders will be pressured into pleading guilty as a result of over-charging by the police or other similar "scare tactics".

Consequently, the LRCC has recommended that before accepting any guilty plea the judge should ascertain by questioning in open court whether any inducement, other than one disclosed as part of a plea agreement, has been offered to the accused.[28] If the judge determines that any "improper inducement" has been made, he or she should reject the plea.[29]

Accuracy and Appropriateness

The Commission noted that there is a danger that accused persons will be induced to plead guilty to offences of which they are innocent. This may arise from either (or both) prosecutorial plea bargaining tactics or improper legal advise. In addition,

it expressed concern over a related criticism that plea bargaining can result in charge reductions that do not reflect the reality of the offences that have been committed.

In addressing these issues, the LRCC has stated its agreement with the suggestion of the CSC that prosecutorial authorities develop guidelines governing the manner in which prosecutorial discretion is exercised.[30] However, the LRCC has also recommended that a statutory mechanism be set up to ensure that findings of guilty which arise from negotiated guilty pleas are appropriate when measured against the actual conduct of the accused and the surrounding circumstances.

The Commission has recommended that counsel for an accused should be prohibited from concluding a plea agreement which requires that the accused person plead guilty to an offence of which he or she maintains their innocence.[31] In addition, Crown counsel should be precluded from participating in any plea agreement that would require an accused to plead guilty to an offence that is not disclosed by the evidence; which inadequately reflects the gravity of the accused person's provable conduct; or which would require the Crown to withhold or distort evidence.[32]

The LRCC has also recommended that judges be statutorily required to make inquiries prior to accepting a guilty plea that has resulted either from police/prosecutorial inducements or from a plea agreement, in order to be satisfied that a factual basis for the plea exists.[33]

Equality

The Commission addressed the concern of disparate prosecutorial treatment of similar accused persons insofar as the opportunities for negotiation and the nature of agreements that may be reached are concerned. It noted that notwithstanding the potential for disparity that may exist, the actual extent to which the plea bargaining process results in sentence disparities is unclear. In addition, it recognized that inequality in sentencing is, to some extent, inevitable under our present criminal justice system. However, it concluded that the potential that plea bargaining has for producing inequality ought to be recognized.

The LRCC was of the view that guidelines ought to be formulated to govern the exercise of the discretion vested in Crown counsel and that the visibility of discretionary decisions be enhanced. To this end, it recommended that all accused persons be afforded the same opportunities to engage in plea discussions and that prosecutors should endeavour to ensure that in plea negotiations accused persons in similar circumstances receive equal treatment.[34]

Enforceability

In the opinion of the LRCC, plea bargains concluded by the prosecution ought to be adhered to and appellate courts ought not to sanction their repudiation except in the gravest of circumstances. The Commission was of the view that the principles of clarity and fairness require that more specific criteria governing the exercise of judicial discretion in this area be enunciated. It concluded that an accused person who was considering entering a guilty plea as a result of an undertaking given by the prosecution is entitled to be reasonably informed as to the circumstances in which the prosecution may be permitted to repudiate the agreement. This requires specific, pre-determined criteria.

In giving effect to these conclusions the Commission has recommended that circumstances be described wherein an accused person who has pleaded guilty is entitled to withdraw the plea before sentence or to launch an appeal against a conviction based upon it.[35] In addition, where the sentence imposed on an accused is within the range anticipated by a plea agreement, the LRCC has recommended that the Crown should not be permitted to appeal against that sentence unless the Crown or the court was misled in some material respect; the public interest in the proper administration of justice is outweighed by the gravity of the crime and the gross insufficiency of the sentence; or the

sentence was an illegal one.[36] Finally, the Commission recommended that any proceedings taken subsequently against an accused, which are in contravention of a plea agreement, ought to be prohibited.[37]

D The Ontario Position

The conduct of Crown counsel in Ontario with respect to plea discussions is governed by guidelines.[38] These guidelines,which have been in effect with little amendment for over 15 years, are presently under review. When initially promulgated it was intended that they reflect principles that had long been recognized as being appropriate for the guidance of Crown counsel during the course of plea negotiations. The principles were reduced to writing in the interests of clarity, certainty and uniformity.

The guidelines identify the paramount consideration in plea discussions as being the proper administration of justice. This requires that due regard be had for the rights of the accused, the protection of the public and the interests of the victim in agreeing to accept a plea of guilty to any lesser or included offence.[39] Expediency, in the sense of reducing backlog or workload is not an appropriate reason for accepting a plea to either a lesser offence or to a lesser number of offences. On the other hand, weaknesses in the Crown's case on the major charge may provide a valid reason for accepting such pleas.[40]

The guidelines do not attempt to formalize the process of plea negotiations. They do however give some general direction as to how discussions with defence counsel ought to proceed. They require that in all negotiations Crown counsel maintain the freedom to do his or her duty as he or she sees fit and that nothing should be said or done during the discussions to fetter their freedom or that of defence counsel.[41] Crown counsel are prohibited from saying or doing anything to compel a plea of guilty to any lesser number of charges or to any lesser or included offence.[42] In addition, they are prohibited from accepting pleas to offences which have not been committed or the prosecution of which is barred by law.[43]

During the course of plea discussions Crown counsel are permitted to advise defense counsel of the submissions that they would make if asked by the judge. However, they are encouraged not to agree to a specific sentence but rather to indicate only the appropriate form or range of sentence that they would suggest.[44]

The guidelines reserve to the Attorney General the right to appeal against a sentence. Crown counsel must clearly indicate that any statement that they may agree to make can not bind the Attorney General in the exercise of his discretion.[45] In practice the Attorney General has seldom appealled against a sentence agreed to by one of his agents.

Crown counsel are required to indict only on those charges in respect of which they intend to proceed to trial and, in the Provincial Court, to withdraw those charges on which they do not intend to proceed.[46]

The issue of the visibility of the process is addressed in the direction that, save in exceptional circumstances, Crown counsel should not discuss with the judge, either alone or with defence counsel, any matters relating to the exercise of the judge's discretion, in the judge's chambers or anywhere but in open court. Where the circumstances require such a discussion to take place in the judge's chambers, Crown counsel is to request the attendance of a court reporter to take down the discussion so that it can be made part of the record of the proceedings. Any representations that were made by Crown counsel in chambers should be restated in open court.[47]

While these guidelines are not considered to be rigid rules that are completely binding in every situation, Crown counsel are expected to conduct all plea discussions in accordance with their spirit.

Endnotes

1. Canadian Sentencing Commission, Sentencing Reform: A Canadian Approach (Ottawa: Minister of Supply and Services Canada, 1987), Chapter 13, pp.401-432

2. Law Reform Commission of Canada, Plea Discussions and Agreements [Draft Discussion Paper] (Ottawa: Law Reform Commission of Canada, 1988)

3. Supra, note 1, at pp.404-405

4. For a complete list of the recommendations relating to plea bargaining that were made by the Canadian Sentencing Commission, see Appendix A

5. CSC Recommendation 13.1

6. CSC Recommendation 13.2

7. CSC Recommendation 13.3

8. CSC Recommendation 13.4

9. CSC Recommendation 13.5

10. CSC Recommendation 13.6

11. CSC Recommendation 13.7

12. CSC Recommendation 13.8

13. CSC Recommendation 13.9

14. CSC Recommendation 13.10

15. CSC Recommendation 13.11

16. CSC Recommendation 13.12

17. Law Reform Commission of Canada, Criminal Procedure: Control of the Process [Working Paper 15] (Ottawa: Information Canada, 1976)

18. Supra, note 2

19. Ibid, at p.2

20. For a complete list of the recommendations that were made by the Law Reform Commission of Canada, see Appendix B

21. LRCC Recommendation 12(1)

22. LRCC Recommendation 12(2)

23. CSC Recommendation 13.9

24. LRCC Recommendation 13

25. LRCC Recommendation 14

26. LRCC Recommendation 11

27. LRCC Recommendation 3

28. LRCC Recommendation 16

29. LRCC Recommendation 19

30. CSC Recommendations 13.7 and 13.8

31. LRCC Recommendation 9

32. LRCC Recommendation 10

33. LRCC Recommendation 17

34. LRCC Recommendation 6

35. LRCC Recommendation 20

36. LRCC Recommendation 21

37. LRCC Recommendation 22

38. For a complete list of the Ontario Guidelines For Plea Discussions, see Appendix C

39. Ontario Guidelines 1 and 9

40. Ontario Guideline 2

41. Ontario Guideline 7

42. Ontario Guideline 3

43. Ontario Guidelines 5 and 6

44. Ontario Guideline 8

45. Ontario Guideline 8

46. Ontario Guideline 4

47. Ontario Guideline 10

Appendix A

Recommendations of the Canadian Sentencing Commission Relating to Plea Bargaining

13.1 The Commission recommends that the interests of the victim in plea negotiations continue to be represented by Crown counsel. To encourage uniformity of practice across Canada, the responsible federal and provincial prosecutorial authorities should develop guidelines which direct Crown counsel to keep victims fully informed of plea negotiations and sentencing proceedings and to represent their views.

13.2 The Commission recommends that, where possible, prior to the acceptance of a plea negotiation, Crown counsel be required to receive and consider a statement of the facts of the offence and its impact upon the victim.

13.3 The Commission recommends that the sentencing judge inquire of the defendant whether he or she understands the plea agreement and its implications and, if he or she does not, the judge should have the discretion to strike the plea or sentence.

13.4 The Commission recommends that federal and provincial prosecutorial authorities collaborate in the formulation of standards or guidelines for police respecting over-charging and/or inappropriate multiple charging.

13.5 The Commission recommends that the relevant federal and provincial authorities give serious consideration to the institution of formalized screening mechanisms to permit, to the greatest extent practicable, the review of charges by Crown counsel prior to their being laid by police.

13.6 The Commission recommends that police forces develop and/or augment internal review mechanisms to enhance the quality of charging decisions and, specifically, to discourage the practice of laying inappropriate charges for the purpose of maximizing a plea bargaining position.

13.7 The Commission recommends that the relevant federal and provincial prosecutorial authorities establish a policy (guidelines) restricting and governing the power of the Crown to reduce charges in cases where it has the means to prove a more serious offence.

13.8 The Commission recommends that the appropriate federal and provincial authorities formulate and attempt to enforce guidelines respecting the ethics of plea bargaining.

13.9 The Commission recommends a mechanism whereby the Crown prosecutor would be required to justify in open court a plea bargain agreement reached by the parties either in private or in chambers unless, in the public interest, such justification should be done in chambers.

13.10 The Commission recommends that the trial or sentencing judge never be a participant in the plea negotiation process. This recommendation is not intended to preclude the judge from having the discretion to

indicate in chambers the general nature of the disposition or sentence which is likely to be imposed upon the offender in the event of a plea of guilty.

13.11 The Commission also recommends that the *Criminal Code* be amended to *expressly* provide that the court is not bound to accept a joint submission or other position presented by the parties respecting a particular charge or sentence.

13.12 The Commission recommends the development of a mechanism to require full disclosure in open court of the facts and considerations which formed the basis of an agreement, disposition or order arising out of a pre-hearing conference.

13.13 The Commission recommends that an in-depth analysis of the nature and extent of plea bargaining in Canada should be conducted by the federal and provincial governments or by a permanent sentencing commission.

Appendix B

Recommendations of the Law Reform Commission of Canada Relating to Plea Bargaining

Definitions

1. The term "plea agreement" should be defined as meaning any agreement by the accused to plead guilty in return for the promise of some benefit.

2. The term "plea discussion" should be defined as meaning a discussion directed toward the conclusion of a plea agreement.

3. (1) The term "improper inducement" should be defined as including the following:

(a) the laying of any charge not believed to be supported by provable facts;

(b) the laying of any charge that is not ordinarily laid with respect to an act or omission of the type atttributed to the accused;

(c) a threat to lay any charge of the type described in paragraphs (a) or (b) above;

(d) a threat that any not guilty plea entered by the accused may result, upon the accused's conviction, in a more severe sentence than that which would ordinarily be imposed upon a similar accused person who has been convicted, following a not guilty plea, of the offence with which the accused is charged;

(e) any offer, threat or promise the fulfillment of which is not ostensibly a function of the maker's office;

(f) any material misrepresentation; and

(g) any attempt to persuade the accused to plead guilty notwithstanding his or her continued denial of guilt.

(2) The term "improper inducement" should be defined so as to make it clear that encouraging the accused to enter into a plea agreement, as defined in Recommendation 1, is not in itself an improper inducement.

Conduct of Plea Discussion, etc.

4.(1) The prosecutor and the accused, or counsel for the accused on his or her behalf, should be permitted to have plea discussions.

(2) No judicial officer before whom proceedings in respect of the accused are or will be held should take part in such discussions.

(3) Not withstanding subsection (2) a judge before whom the parties are to appear may inquire of the prosecution and defence whether plea discussions have taken place and, if they have not, may indicate the possible usefulness of such discussions to the parties and inquire whether they wish to avail themselves of the opportunity to have discussions.

5.(1) A prosecutor should not, when there is an alternative, have plea discussions directly with the accused in the absence of the accused's counsel.

(2) A prosecutor with whom an unrepresented accused wishes to have plea discussions should inform the accused that

(a) representation by counsel may be advantageous to the accused; and

(b) if the accused cannot afford to retain counsel, he or she should ascertain from the provincial legal aid plan whether he or she is eligible for assistance.

6. (1) All accused persons should, subject to Recommendation 5, be afforded the same opportunities for engaging in plea discussions.

(2) A prosecutor should endeavour to ensure, in the course of plea discussions, that accused persons in similar circumstances receive equal treatment.

7. A prosecutor, police officer or defence counsel should not offer any improper inducement for the purpose of encouraging an accused to plead guilty to any charge.

8. No judicial officer before whom proceedings in respect of the accused are or will be held should offer any inducement for the purpose of encouraging an accused to plead guilty to any offence.

9. Counsel for an accused person should not conclude on the accused's behalf any plea agreement that requires the accused to plead guilty to an offence of which the accused maintains he or she is innocent.

10. A prosecutor should not suggest, conclude or participate in any plea agreement that

(a) requires the accused to plead guilty to an offence that is not disclosed by the evidence;

(b) requires the accused to plead guilty to charges that inadequately reflect the gravity of the accused's provable conduct; or

(c) requires the prosecutor to withhold or distort evidence.

11. A prosecutor should not participate in any plea agreement contemplating a disposition that departs significantly from that which would otherwise (i.e., in the absence of a plea agreement) have resulted upon the accused's pleading guilty to the same offence.

Judicial Supervision

12. (1) A prosecutor and an accused who have concluded a plea agreement should, before the accused's plea is entered, disclose to the court the nature of that agreement, and the reasons therefor.

(2) The disclosure and justification contemplated by part (1) of this recommendation should be made in open court unless the likelihood of serious harm to the accused or to another person requires otherwise.

13. Upon being informed, in accordance with Recommendation 12, that the prosecutor and the accused have concluded a plea agreement, the judge should forthwith ascertain by questioning in open court whether the accused understands the nature and consequences of the plea agreement.

14. No effect should be given to any plea agreement contemplating a disposition that departs significantly from that which would otherwise (i.e., in the absence of a plea agreement) have resulted upon the accused's pleading guilty to the same offence.

15. In any case in which the judge, having been informed of the existence and nature of a plea agreement and of the reasons therefor, determines that an accused should not be judicially disposed of in the manner contemplated by the plea agreement, the judge should inform the accused of this fact, and inform the accused that no plea agreement or joint submission is binding upon the judge.

16. Before any guilty plea is accepted from an accused, the judge should ascertain by questioning in open court whether any inducement to plead guilty, other than an inducement disclosed as part of a plea agreement, has been offered to the accused.

17. In any case in which the police or the prosecutor have offered an inducement to the accused to plead guilty, or in which the prosecutor and the accused have concluded a plea agreement, the judge should, before any guilty plea is accepted from the accused, make such inquiry as he or she considers necessary in order to be satisfied that a factual basis for the accused's guilty plea exists.

18. In determining whether to accept an accused's plea of guilty to any offence [other than the offence charged,] the judge should consider the nature of, and reasons for, any plea agreement concluded between the accused and the prosecutor.

19. The judge should reject an accused's guilty plea if

(a) the plea was entered as a result of an improper inducement;

(b) the plea was entered as a result of a judicial officer's having offered an inducement for the accused to plead guilty;

(c) the accused is pleading "not guilty of the offence charged but guilty or [another] offence arising out of the same transaction...," and the offence to which the accused is pleading guilty inadequately reflects the gravity of the accused's provable conduct; or

(d) no factual basis for the accused's guilty plea exists.

Withdrawals and Appeals

20. An accused who has entered a guilty plea should be entitled to withdraw that plea before sentence, or to appeal against a conviction based thereon,

(a) if it was entered as a result of an improper inducement;

(b) if it was entered as a result of the judge's having offered an inducement for the accused to plead guilty;

(c) if it was entered as a result of a misapprehension as to the nature or effect of a plea agreement concluded between the accused and the prosecutor; or

(d) if the prosecutor has breached a plea agreement concluded with the accused.

21. Where an accused has pleaded guilty to an offence and, upon his or her conviction, has received a sentence that accords with, or is within the range anticipated by, a plea agreement, the prosecutor should not be permitted to appeal against the sentence received by the accused unless it is shown.

(a) that the sentence is not, in the circumstances, one that is permitted under the Criminal Code;

(b) that, in the course of plea negotiations, the prosecutor was misled in some material respect;

(c) that the court, in passing sentence, was misled in some material respect; or

(d) that the "public interest in the orderly administration of justice is outweighed by the gravity of the crime and the gross insufficiency of the sentence" received by the accused.

Abuse of Process

22. In any case in which the accused has pleaded guilty to an offence in accordance with a plea agreement concluded between the accused and the prosecutor, any proceedings taken subsequently against the accused in contravention of that agreement should be prohibited.

Exclusion of Evidence

23. Evidence of a guilty plea, later withdrawn, or of an offer to plead guilty to an offence, or of statements made in connection with any such plea or offer, should be inadmissible against the accused for the purpose of determining guilt or attacking credibility in any proceeding.

Appendix C

Ontario Guidelines for Crown Counsel Relating to Plea Discussions

Ontario

Ministry of the
Attorney
General

PLEA DISCUSSIONS

In the interests of clarity, certainty and uniformity, the following are the ten principles applicable to plea discussions which have long been recognized by this Ministry.

1. The proper administration of justice is the paramount consideration in all plea discussions, and, as with all the duties of the Crown Attorney, due regard must be had for the rights of the accused, the protection of the public and the interest of the victim in accepting the plea of guilty to a lesser or included offence.

2. Expediency in reducing workload is not acceptable as a reason for accepting a plea to a lesser offence or to a lesser number of offences. Expediency in this sense does not include weaknesses in the Crown's case on the major charge or charges, which may be a valid reason for accepting a plea to a lesser offence or to a lesser number of offences.

3. The Crown Attorney should do nothing to compel a plea of guilty to a lesser number of charges or a lesser or included offence.

4. The Crown Attorney should indict only on those charges on which there is an intention to proceed to trial. In Provincial Court trials, the Crown Attorney should withdraw those charges on which there is no intention to proceed to trial.

5. The Crown Attorney should not consent to the acceptance of a plea of guilty to an offence which has not been committed.

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6. The Crown Attorney should not consent to the acceptance of a plea of guilty to a charge that cannot be prosecuted because it is barred at law.

7. In all discussions with defence counsel the Crown Attorney must maintain the freedom to do his or her duty as he or she sees fit. Nothing should be said or done to fetter the freedom of the Crown Attorney and the defence counsel.

8. The Crown Attorney may state to defence counsel the views that may be given if asked by the presiding judge to comment on the matter of sentence, but should not agree to a specific sentence. The Crown Attorney may draw the attention of the presiding judge to any mitigating or aggravating circumstances that may appear to be relevant and may make submissions concerning the appropriate form and range of sentence.

   However, it should be clearly stated that the matter of sentence is strictly for the judge and that any statement that is made cannot bind the Attorney General in exercising the discretion whether to appeal against a sentence or not. This discretion, however, will be exercised only in exceptional circumstances.

9. The Crown Attorney always should act as agent of the Attorney General and, as such, is responsible for the proper administration of justice.

10. Apart from exceptional circumstances, neither the Crown Attorney nor the defence counsel - either alone or together - should discuss with the judge matters bearing on the exercise of the judge's discretion, in the judge's chambers or any place other than in open court. Where attendance in the judge's chambers is dictated by the circumstances, the Crown Attorney should always request that a court reporter be present to take down the full discussion which should form part of the record of the case.

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All representations to the judiciary on which they are to base the exercise of their discretion concerning a plea of guilty should be restated in open court. Such representations need not be lengthy, but should be sufficient to satisfy the public in each case that there is nothing sinister or clandestine in the process of plea discussion.

These principles are not rules to be applied rigidly or to be considered binding in every situation. However, although a Crown Attorney must have a free and unfettered discretion as to how to apply these principles, the Crown Attorney also has a continuing responsibility to conduct all plea discussions in accordance with their spirit.

CRIMINAL LAW DIVISION GUIDELINE #P1

JANUARY 1, 1988

SENTENCING NOW AND IN THE FUTURE

CHAPTER 4

ASSESSMENT OF PRESENT SENTENCING SYSTEM AND PRISONS

Material prepared by Patrick Duncan of
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March 3 & 4, 1989

Introduction

The Sentencing Hearing
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INCARCERATION: PROTECTOR OF SOCIETY?

INTRODUCTION

In R. v. Chisholm (1985), 67 N.S.R. (2d) 66, Mr. Justice MacDonald of the Nova Scotia Court of Appeal reviewed the principles of sentencing in the following terms:

> "The basic purpose of the Criminal Law is to preserve the well being and general order of society. The sentencing process is vital to such purpose. As a result this and other appellate courts have said that the paramount aim or purpose of sentencing is the protection of the public. This protection has both a subjective and an objective meaning - first, the protection of society from the particular offender and secondly, the protection of society from the commission of a particular type of offence. In the majority of cases it is this second meaning that is being referred to when the 'protection of society' is alluded to. This court in R. v. Grady (1971), 5 N.S.R. (2d) 264, said that the protection of the public could be achieved either by (a) deterrence or (b) reformation and rehabilitation of the offender or (c) both deterrence and rehabilitation." (at p. 75)

In cases of sexual assault upon children, our Appeal Court has expanded this statement of principle by holding that:

> "Under present circumstances, courts have little alternative but to use the sentencing process to express society's total abhorrence of acts like those committed by this respondent." (per Clarke, C.J.N.S., in R. v. Wood, S.C.C. 01439, delivered June 6, 1986, at p. 3)

How then are Nova Scotia courts attempting to attain the objective of "protecting the public?"

Incarceration, it seems, is being resorted to by the Nova Scotia courts for an increasingly broader spectrum of crime. It is being imposed more quickly and with larger numbers of first offenders being sent to jail. Rehabilitation of the offender has been reduced in many cases to the role of mitigating the length of incarceration, not determining whether incarceration is to be imposed or not.

The Nova Scotia Court of Appeal has demonstrated a strong commitment to the incarceration of offenders as a means of protecting the public, as exhibited by the following cases and comments.

In R. v. Perlin (1978), 23 N.S.R. (2d) 66 at p. 68, the Court of Appeal held that:

> "the overriding consideration in sentencing with respect to crimes of violence must be deterrence and it is for this reason that save for exceptional circumstances substantial terms of imprisonment must be imposed."

This has been interpreted in cases of sexual assault upon children in the following terms:

> "We have also commented upon the fact that charges of sexual assault are before us with 'alarming frequence'. We are powerless to prevent crimes but we do have the power and the duty to impose fit and proper sentences. Sexual abuse of near helpless children by adults, upon whom they should be able to rely for protection, should incur sentences which hopefully deter the perpetrator and others so inclined and demonstrate society's revulsion of such conduct. Children must be protected; deterrence must be both specific and general, with emphasis on the general aspect of deterrence." (R. v. Hawkes (1988), 81 N.S.R. (2d) 156 at p. 157)

In R. v. Efford (S.C.C. 01916, judgment delivered on November 29, 1988), Mr. Justice Chipman, on behalf of the Court, held that although the sexual assaults were "at the extremely low end of the scale" and notwithstanding the many positive circumstances of the offender, a period of four months incarceration together with probation for one year was required to satisfy the "element of general deterrence".

In R. v. Blackburn (1986), 75 N.S.R. (2d) 30 (N.S.C.A.) the Court cites with approval the case of R. v. Sandercock (1985), 22 C.C.C. (3d) 79 (Alta.C.A.) in which a "starting point" of three years incarceration was held to be appropriate for major sexual assaults.

Incarceration as a "starting point" has also been adopted by the Nova Scotia Court of Appeal for robbery. In R. v. Hingley (1977), 19 N.S.R. (2d) 541; 24 A.P.R. 541, Chief Justice MacKeigan said at p. 544:

> "We must begin with the premise that armed robbery and robbery with violence require strongly deterrent sentences of imprisonment. Only where such an offence is isolated, minor, and committed, perhaps impulsively or drunkenly, by a very young person or one of previously good character, should sentences as low as two or three years' imprisonment be considered. It is such cases that we had in mind in referring to a minimum of three years' imprisonment in R.v. Brennan and Jensen (1975), 11 N.S.R. (2d) 84, at p. 88, and R. v. Smith (1975), 12 N.S.R. (2d) 289, at p. 300."

and for break and entry:

> "This court has frequently observed that it looks seriously upon the invasion of property by break and enter and it has expressed the view that three years imprisonment is a bench mark from which a trial judge should move as the circumstances in the judgment of the trial judge warrant." (R. v. Zong (1986), 72 N.S.R. (2d) 432 at p. 433)

and for petty retailers in narcotic offences:

> "The general range of sentence, even for minor traffickers, has been between six and twelve months imprisonment." (R. v. Ferguson (1988), 84 N.S.R. (2d) 255 (N.S.C.A.) at p.256)

Jail terms are usual for offences of theft involving breach of trust and have become increasingly common for drinking and driving related offences.

These and other cases show the increasing willingness of courts to sacrifice the rehabilitation of the individual offender, in order to give effect to the element of general deterrence and public abhorrence for the criminal act.

If, however, the objective is to protect the public, we must give more than lip service to the rehabilitation of the individual offender. At the point of the finding of guilt the individual has been proven to be an identifiable risk to society. Further, the offender is at the hands of society, in the person of the sentencing judge. At that point in time, there is a real opportunity to take a proven risk and reduce, hopefully eliminate, the risk of that individual reoffending.

Since imprisonment is becoming so prevalent as an aspect of correcting the offender, it is submitted that attention must be given to the prison system as rehabilitative facilities and not just holding pens. This is no little task.

In its 1974 report on "The Principles of Sentencing and Dispositions" the Law Reform Commission of Canada stated rather bluntly that when a sentencing judge imposes a jail term to "protect the community" the judge can only mean "that while the offender is locked up the community will be free of his depradations". It also viewed jail terms as strengthening recidivism rather than reducing it (at p. 4 - 5).

A bleak view was presented by the office of the Solicitor General of Canada in 1977 (in "A Summary and Analysis of Some Major Inquiries on Corrections" - 1938 to 1977) wherein it was stated:

> "Growing evidence exists that, as educational centres, our prisons have been most effective in educating less experienced, less hardened offenders to be more difficult and professional criminals." (p. iv)

It is submitted that there is still significant truth in these views. Nevertheless, we cannot as a society throw up our arms in despair, but rather must identify on an ongoing basis the problems of imprisonment and attempt to remedy them. This paper seeks only to address a few of the more problematic areas which I perceive to be of current concern.

THE SENTENCING HEARING

There is an appalling lack of knowledge on the part of Judges, Prosecutors and Defence counsel of what correctional facilities exist; how they are physically constituted; how they are administered; what programming, if any, is available; how prisoners are slotted into programs; how programming is carried out; the needs and interaction of various classes of prisoners; and the means and consequences of early release programs.

(i) JUDGES

Many Judges have taken it upon themselves to visit some correctional facilities. Those who do, frequently reflect this understanding and knowledge in their sentencing decisions. The late Judge Peter O Hearn of the County Court was well respected for his views on sentencing due, in part, to the considerable effort he made in learning of new directions in corrections, and in being open to the innovations proposed by counsel. It is difficult to understand how some Judges hold the view (and I am of the opinion that some do) that it is not necessary/desirable to make such tours of institutions, where they can see first hand what role prisons can play in protecting the public, apart from segregating the offender from society.

Similarly Prosecutors and Defence counsel can also benefit greatly from learning of the inner workings of the institutions.

(ii) CROWN PROSECUTORS

There is a view held by some that the function of the Prosecutor at the time of sentencing is to recite the facts of the offence, point out the offender's negative character attributes and to regurgitate the most recent and most unfavourable (to the offender) sentencing decisions. Fortunately, not all Prosecutors share that view.

I submit that Prosecutors should have a good understanding of institutions and their capabilities so that they can truly assist the sentencing court in making the most effective use of its already limited options. If the offender requires a certain type of counselling or program, it is important that the court be made aware of the existence or non-existence, as the case may be, of such programming. This information may be the difference between an intermittent sentence and a straight time sentence; or between incarceration in a provincial or a federal institution. It would also assist the Prosecutor in buttressing "pie in the sky" submissions of inexperienced Defence counsel. Alternatively, they may find themselves agreeing with knowledgeable suggestions made by Defence counsel pertaining to the place and length of incarceration.

(iii) DEFENCE COUNSEL

Defence counsel are seeing fewer and fewer options for sentences which allow serious (and some not so serious) offenders to receive non-custodial dispositions. As options dwindle, a greater understanding of incarceration is required by the defence bar in order to provide the client with knowledgeable advice on the places

of incarceration and how the offender can optimize their chances of gaining entry to constructive programming while incarcerated. Defence counsel also need to bring creativity to the court room and a good understanding of the prevailing case law so as to present well informed and carefully thought out sentencing options to the court.

(iv) RECOMMENDATIONS

To accomplish these objectives, inter alia, I recommend that the appropriate governmental authorities, federal and provincial, strongly encourage all Judges and Prosecutors to visit correctional facilities in their respective areas, together with any regional institutes to which offenders in their geographical area may be sentenced. e.g. Dorchester Penitentiary. In my view such visits should be mandatory.

I also recommend that the Nova Scotia Bar Society and the Canadian Bar Association strongly encourage members of the bar, practicing in criminal law, to make such visits and that the respective governmental agencies cooperate in this effort.

I recommend a systematic dissemination of information by Corrections Canada and the Solicitor General of Nova Scotia to the bench and the bar informing them of existing programming, counselling and medical treatment facilities in correctional institutions. This could be provided, for example, by regional, annual seminars or by news letters to interested parties. News letters and/or seminars can also provide updates on programming plans and act as a forum for seeking out the views of the Judges, the Prosecutors and the Defence bar, where appropriate.

THE INSTITUTIONS

(i) THE MENTALLY ILL OFFENDER

To anyone involved in the sentencing of mentally ill offenders, the problem is obvious. Nova Scotia desperately needs a facility that is suitable for treatment of these individuals.

The problem gets its birth with the medical diagnosis that while the offender is mentally ill, he is not insane within the meaning of Section 16 of the Criminal Code of Canada, R.S.C. 1985, c. C-46. The problem is further aggravated when the individual is viewed as being untreatable, for in those cases the sentence to be imposed can only hope to achieve segregation of the offender from society for a period of time.

The result is that the offender is placed in correctional facilities where he/she is a disrupting influence on attempts to provide for the security and rehabilitation of mainstream inmates. Because the mentally ill offenders are spread thinly throughout a variety of institutions, there can be no concerted effort, medically or economically, to provide the treatment which many can benefit by. These people require specialized facilities which are simply not available to provincial institutions, and which have only relatively recently been introduced into the federal prison system.

In the interim, Judges and lawyers have attempted, in good faith, to compensate for these inadequacies through creative sentencing which, I suspect, creates an administrative pandemonium

for the correctional facilities. Some examples are warrants of committal which carry the words "recommendation for psychiatric treatment"; or Judge's letters to the institutions requesting immediate granting of Temporary Leaves of Absence for medical treatment where the sentence required is in excess of that allowed to be served on an intermittent basis. There are many methods attempted, but an adequate facility designed for the mentally ill offender is the only solution.

(ii) THE "PROTECTIVE CUSTODY" INMATE

This is a group of inmates whose numbers are increasing dramatically. They are inmates designated for segregation from the general inmate population. Such segregation arises from special fears for their safety or the safety of those around them. Examples of such inmates are persons who are HIV positive; persons who have Hepatitis "B" (frequent with drug users); sexual assault offenders; and "rats" (inmates who inform against other offenders).

Provincial institutions offer no programming to these individuals because of security considerations and available space. This is more than unfortunate. These offenders are frequently the people who are most afraid of incarceration. Specific deterrence for them is very real. The present system provides these offenders with a measure of protection which lessens the element of specific deterrence for them, and at the same time totally ignores the rehabilitation of these offenders who have the potential to be the most motivated group for avoiding further conflict with the law.

(iii) THE SEXUAL OFFENDER

I have elected to deal with this individual separately, although these offenders share similar problems to the "mentally ill offender" and the "protective custody inmate". Indeed, they qualify under both these titles. I have done so because of the increasing numbers of these inmates and the special problems they create. The following is an excerpt from a recent news letter of the John Howard Society which conveys the situation:

"Dramatic Rise in Sexual Offences

> In a two-year period between March of 1986 and March of 1988, the number of inmates serving Federal sentences for sexual offences has increased by five times (from 20 to 118 in the Atlantic region). This dramatic increase is attributed to changes in public awareness and attitude toward sexually-assaultive behavior. These attitudes have been reflected in modifications to the Criminal code and the huge increase in reporting incidents which had previously gone unreported.
>
> Profile of a Typical Sex Offender:
>
> Sex offenders serving Federal sentences in the Atlantic Region currently comprise 12.5% of the populations. Their characteristics are quite different from those that we have seen in the general population over the years. They are serving longer sentences, (average of 4 yrs, 9 mos.); their average age is 37, which is considerably older than the rest of the general population; they have few previous criminal convictions, better than average employment records, and despite the nature of their offences, have some degree of community of support. Due to an abhorrence of their offences, they are usually rejected by the "normal" prison population. Other characteristics may include severe substance abuse, learning disabilities, brain damage, or sexual abuse as a child.

> All sexual offenders are released to the community at some time, either on parole or without the benefits of supervision. At the present time, there is very little treatment available at the community level for these offenders. It is, therefore, imperative for members of our Society to encourage all levels of Government to set up appropriate treatment programs immediately, as we may all be affected by the higher rate of recidivism.
>
> (statistics from Atlantic Region Strategic Directions 88-89, C.S.C.)"

I was heartened to learn recently of the establishment in Bridgewater of a treatment program for convicted sexual offenders of children. It was commenced voluntarily by a parole officer with Canada's Solicitor General and a probation officer with the provincial Attorney General's Department. This is a small but positive step in this area. Unfortunately, the program does not assist the inmate, nor is it available to persons whose crime was violent and/or against adults. More distressing is that while the program was encouraged by the respective employers of these individuals, it does not appear to be a part of a larger plan to address the problem.

Many sexual offenders, particularly those involving abuse of children, are being advised by their legal counsel to immediately seek out counselling in anticipation of sentencing. Judges are now hearing more evidence of psychologists, counsellors, therapists and psychiatrists with respect to the rehabilitative prospects of these offenders. Many are considered good prospects with proper treatment. Recidivism among these offenders is markedly reduced when treated, hence protection of the public from these individuals becomes very attainable, and very dependent on the treatment programs.

Once incarcerated the offender loses his employment, hence his ability to continue with privately retained therapists. His incarceration is usually of sufficient duration to effectively wipe out the beneficial effects of the pre-incarceration treatment program. During imprisonment there is no incentive to the offender to continue treatment, even if it were available. Treatment programs are not available and even if staff were available, it could not be effected because these offenders have to be segregated into protective custody units where they would not be able to enjoy such programming.

Upon release, the offender must find new employment and thereby the means to support expensive therapy sessions. (One should not forget that there is a paucity of qualified therapists available to the offender, even if the offender can afford one.) Employment is difficult since a resume indicating that he was a "model prisoner while serving time for sexual assault" is hardly an encouragement to potential employers. Without the available means, the treatment is not obtained. I suggest that if incarceration is to be mandatory for these offenders, that it is equally mandatory that proper treatment programs and facilities be provided in a correctional facility. If the numbers in a provincially run or a federally run institution do not warrant such a facility, then a cooperative effort must be considered by the affected correctional authorities of each jurisdiction. Such a facility would likely be a part of a complex which would include facilities for non-sexual offenders who are mentally ill.

The necessity for such a centre was a subject, very recently, of comment by MacDonald, J.A., in R. v. White (S.C.C. 01935, judgment delivered January 24, 1989) at p. 3- 4:

> "The cause or causes of the increase in sexual assaults may be many and varied and may in part, at least, reflect upon the appropriateness of the sanctions imposed by the Courts for such offences.
> .
> .
> .
> It is to be regretted that there is not some institution combining the functions of both a hospital and a prison to which sexual offenders could be sentenced and where they could obtain treatment. The absence of such treatment centres should not by itself, however, entitle sexual offenders to more lenient sentences than would otherwise be imposed."

To fail to meet this obligation is to acknowledge to every victim of a recidivist sexual offender that the correctional system was not intended to provide that victim with the protection that the Courts state to be their objective.

(iv) PROGRAMMING PROBLEMS

(a) Rural Institutions

There is an absence of programming in rural correctional facilities, thereby leaving a segment of the inmate population with little to do beyond watch television and to pass the day with idle conversation, while waiting for their release.

Facilities at Halifax, Cape Breton and Kings County Correctional Centres are, I perceive, better, but still fraught with programming problems.

(b) Space Allocation

First and foremost must be space allocation. I have heard it said that even if sufficient staff and materials were available to program for all qualified inmates, there would be no place to hold classes.

My own experience in trying to find a room to interview clients at the Halifax County Correctional Centre is an indicator. I have interviewed in the library, the chapel, offices of correctional staff, the staff dining room and the regular interview room; and some times have shifted rooms as often as three times in a single interview, all because there was no place for interviews to be conducted.

The attempts by staff to accommodate the tutor, or the physician, or the lawyer, or the clergyman, or the drug counsellor become an exercise in frustration for the visitor, the inmate and the staff alike.

Space problems can be cured by the use of mobile classrooms, within the walls.

(c) Insufficiency of Materials and Choice

Where training programs are available there is, according to inmates, a lack of sufficient spaces in the most desired programs.

Correctional centres deal with a significant number of people whose stay is relatively short. By the time there is an available space, the inmate is nearing release and thus it is futile for them to commence a program unless there is a mechanism in place for them to continue the program, uninterrupted, upon release from custody. If unable to complete the program they wasted their time and took a spot for a short time that could have been better used by another longer term inmate.

The notion often expressed by courts that by sending an inmate to a federal institution, they are sending them off to "get a trade" appears, at times, to be well-intentioned but optimistic.

Inmates, not unexpectedly, concentrate on getting released - the sooner the better. If a parole eligibility date is approaching then "getting a trade" is a secondary (or lower) priority. Some educational programs are more popular than others and so inmates can be shunted off to their second or third choices leaving them in training for a trade to fill the jail time, not in pursuit of a viable self-fulfilling trade at which they intend to work when released.

The solution to this problem for both federal and provincial institutions may include extended programming to involve inmates in valuable skills training which they have an interest in; and to accomplish this at the earliest possible time after incarceration.

(d) Inmate Incentive and Release

In order for any rehabilitative programming to be effective, it must have interested participants. It must be tempting for correctional staff to view programming as being the provision of sufficient "entertainment" to the inmates so as to distract them from their loss of liberty in a manner which is most agreeable to the inmate and the least work for the staff. What is particularly disturbing is that many inmates would be quite content to be placated by a regular film series, time in the recreation room and listening to live concerts of visiting entertainers.

To make programming effective, a method of motivating prisoners to participate in them, in a meaningful way, must be developed. One thought which occurs to me in this regard is the tying of early release programs to productivity in institution sponsored rehabilitative programs. To do this, however, one must insure availability of programs to all inmates, of all levels of ability. There must be sufficient openings to accommodate all who have the aptitude and interest to enroll in any given program. Further, there must be a means of allowing the prisoners to complete the program, even though completion may not be effected until after release.

This requires an effective after release monitoring system which I do not think exists at the present time.

(e) Schooling

It is my understanding that the provincial Department of Education provides the teachers and curriculum to the inmate population. I am in favour of this as providing continuity for inmates in their attempts to continue or re-enroll in the school system.

Unfortunately, the Department of Education allows its teachers in correctional facilities to conduct classes on the same basis as the regular school year, leaving inmates without upgrading programs in the summer months. If this is in fact the case, then it should be altered to recognize that jails have no seasons and classes for inmates are always in.

CONCLUSION

This paper has been drawn from my personal opinions and from comments of inmates, ex-inmates, judges, prosecutors, correctional service officers, policeman and academics. Where statements or conclusions are erroneous, I accept responsibility.

It is intended that this paper be thought provoking for those of us who work with the inmate or the soon to be inmate population. The good intentions of people who work "in the system" are not questioned. As one of those people, I know I share the common objective of seeing that incarceration, as one aspect of sentencing, becomes a more productive process in achieving the ultimate objective of protecting the public.

SENTENCING NOW AND IN THE FUTURE

CHAPTER 5

LEGISLATIVE DEVELOPMENTS RELATING TO VICTIMS

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A SUMMARY OF
LEGISLATIVE DEVELOPMENTS
RESPECTING VICTIMS AND SENTENCING

Introduction

For more than a decade, the concerns and needs of victims of crime have been a focus of Provincial Attorneys General and the Federal Minister of Justice. Following the report of the Federal-Provincial Task Force on Justice for Victims of Crime in 1983, the Provinces and the Federal Government established a Working Group on Justice for Victims of Crime, which submitted its report to the Deputy Minister of Justice for Canada in December of 1985.

The Working Group identified a number of legal issues wherein amendments to the Criminal Code would be required to improve the situation of victims of crime within the criminal justice system. These included, inter alia, the following:

1. The imposition of a duty on police and court officials to return the victim's property as soon as possible and to impose a maximum period of detention with a procedure for extension of the period of detention only where the property may still be required as evidence.

2. The introduction of a procedure of photographing stolen property to be used as evidence in criminal proceedings, where possible, so that the property could be returned promptly to its lawful owner,

3. The submission of a victim impact statement by a victim to the court at the time of sentencing, and

4. Restitution to victims of crime.

On December 2, 1985, the Criminal Law Amendment Act, 1985 was proclaimed in force. This Act contained a comprehensive regime of procedures for the detention of things seized in crime related investigations. The remaining issues identified above were considered further, and this process lead to the introduction of Bill C-89, an Act to amend the Criminal Code (victims of crime), which was passed by Parliament on May 3, 1988 as Chapter 30 of the Statutes of Canada, 1988.

The provisions of Bill C-89 dealing with photographing evidence, proof of ownership and value of property and those dealing with victim impact statements were proclaimed

in force on October 1, 1988. Other provisions of Bill C-89, including those dealing with restitution for victims of offences and the victim fine surcharge, have yet to be proclaimed.

Victim Impact Statement

The Federal-Provincial Task Force on Justice for Victims of Crime recommended in 1983 that the Criminal Code be amended to permit the introduction of a victim impact statement to be considered by the court at the time of sentencing. In March of 1988, the Federal and Provincial Ministers responsible for criminal justice adopted a Statement of Principles for Victims of Crime. This followed the adoption by the 7th United Nations Congress on the Prevention of Crime and Treatment of Offenders of a Declaration of Basic Principles of Justice for Victims of Crime. Clause 6 of the Ministers' Statement of Principles reads as follows:

> "Where the personal interests of the victim are affected, the views or concerns of the victim should be brought to the attention of the court, where appropriate and consistent with criminal law and procedure."

Section 7 of Bill C-89 amends Section 622 of the Criminal Code by adopting a procedure whereby those persons who have suffered harm or loss or, in the case of a deceased person, the family of that person, may prepare a statement describing the harm done to, or loss suffered by them, arising from the commission of the offence for submission to and consideration by the court at the time of sentencing. The text of this Section is as follows:

> *VICTIM IMPACT STATEMENT—Procedure for victim impact statement—Other evidence concerning victim admissible—Definition of "victim".*
>
> *(1.1) For the purpose of determining the sentence to be imposed on an offender or whether the offender should be discharged pursuant to section 662.1 in respect of any offence, the court may consider a statement, prepared in accordance with subsection (1.2), of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence.*
>
> *(1.2) A statement referred to in subsection (1.1) shall be*
>
> *(a) prepared in writing in the form and in accordance with the procedures established by a program designated for the purpose by the Lieutenant Governor in Council of the province in which the court is exercising its jurisdiction; and*
>
> *(b) filed with the court.*
>
> *(1.3) A statement of a victim of an offence prepared and filed in accordance with subsection (1.2) does not prevent the court from considering any other evidence concerning any victim of the offence for the purpose of determining the sentence to be imposed on the offender or whether the offender should be discharged pursuant to section 662.1.*
>
> *(1.4) For the purpose of this section, "victim", in relation to an offence,*
>
> *(a) means the person to whom harm is done or who suffers physical or emotional loss as a result of the commission of the offence, and*
>
> *(b) where the person described in paragraph (a) is dead, ill or otherwise incapable of making a statement referred to in subsection (1.1), includes the spouse or any relative of that person, anyone who has in law or in fact the custody of that person or is responsible for the care or support of that person or any dependant of that person.*

Restitution

The Federal-Provincial Task Force report also included specific recommendations on the issue of restitution. These were as follows:

> -The Criminal Code, Section 653 be amended to require Judges to consider restitution in all appropriate cases and to provide an opportunity to victims to make representations to the Court regarding their ascertainable losses.
>
> -A provision should be included in the Criminal Code to empower the Court to impose a jail term where the accused wilfully defaults in restitution ordered by the Court.

The Federal-Provincial Working Group commented favourably upon these two Task Force recommendations. As a result, Bill C-89 included a number of provisions dealing with restitution for victims of offences. The text of these provisions is as follows:

RESTITUTION TO VICTIMS OF OFFENCES.

653. Where an offender is convicted or discharged under section 662.1 of an offence, the court imposing sentence on or discharging the offender shall, on application of the Attorney General or on its own motion, in addition to any other punishment imposed on the offender, if it is applicable and appropriate in the circumstances, order that the offender shall, on such terms and conditions as the court may fix, make restitution to another person as follows:

(a) in the case of damage to, or the loss or destruction of, the property of any person as a result of the commission of the offence or the arrest or attempted arrest of the offender, by paying to the person an amount not exceeding the replacement value of the property as of the date the order is imposed, less the value of any part of the property that is returned to that person as of the date it is returned, where the amount is readily ascertainable; or

(b) in the case of bodily injury to any person as a result of the commission of the offence or the arrest or attempted arrest of the offender, by paying to the person an amount equal to all pecuniary damages, including loss of income or support, incurred as a result of the bodily injury, where the amount is readily ascertainable.

RESTITUTION TO PERSON ACTING IN GOOD FAITH.

654. Where an offender is convicted or discharged under section 662.1 of an offence and

(a) any property obtained as a result of the commission of the offence has been conveyed or transferred for valuable consideration to a person acting in good faith and without notice, or

(b) the offender has borrowed money on the security of that property from a person acting in good faith and without notice,

the court may, where that property has been returned to the lawful owner or the person who had lawful possession of that property at the time the offence was committed, order the offender to pay as restitution to the person referred to in paragraph (a) or (b), on such terms as the court may fix, an amount not exceeding the amount of consideration for that property or the total amount outstanding in respect of the loan, as the case may be.

INQUIRY CONCERNING AMOUNT OF LOSS AND ABILITY OF OFFENDER TO PAY—Offender to disclose finances—Report concerning offender's ability to make restitution—Copies of report provided to parties—Time within which restitution to be made—Payment to estate.

653. (1) Before making an order to pay an amount as restitution under section 653 or 654 and for the purpose of determining the amount to be paid, the time for payment and the method of payment, the court shall, unless the offender acknowledges the ability to pay, conduct or cause to be conducted an inquiry concerning the present or future ability of the offender to pay the amount and, in so doing, the court shall consider

(a) the employment, earning ability and financial resources of the offender at the present or in the future and any other circumstances that may affect the ability of the offender to make restitution;

(b) any benefit, financial or otherwise, derived, directly or indirectly, by the offender as a result of the commission of the offence; and

(c) any harm done to, or loss suffered by, any person to whom restitution may be ordered to be made.

(2) The court may require the offender, for the purposes of subsection (1), to disclose to the court, orally or in writing, particulars of the financial circumstances of the offender in the manner and form prescribed by the court and that information shall not be used for any other purpose, except in a prosecution for perjury or giving contradictory evidence in any proceeding.

(3) A court may require that a written report be prepared and filed with the court containing information concerning

(a) the financial status of the offender and, in particular, the ability of the offender to make restitution; and

(b) the amount to be paid to any person by the offender.

(4) Where a report is filed with the court under subsection (3), the clerk of the court shall forthwith cause a copy of the report to be provided to the offender or counsel for the offender and the prosecutor.

(5) Where a court makes an order of restitution under section 653 or 654 in relation to an offender, the court may require the offender to comply with the order forthwith or within a specified period ending not later than, or in specified instalments ending not later than, three years after the day on which the order is made.

(6) Where a person to whom an amount is ordered to be paid under section 653 or 654 dies before the order is fully complied with, the amount shall be paid to the estate of such person.

MONEYS FOUND ON OFFENDER.

655.1 All or any part of an amount that is ordered to be paid under section 653 or 654 may be taken out of moneys found in the possession of the offender at the time of the arrest of the offender if the court making the order, on being satisfied that ownership of or right to possession of those moneys is not disputed by claimants other than the offender, so directs.

NOTICE TO INTERESTED PERSONS—Notice of orders under section 653 and 654—Service of notices—Order of restitution to be recorded.

655.2 (1) Before making an order of restitution under section 653 or 654, the court may direct that notice be given to any person who may be the beneficiary of such an order and to such other persons having an interest in the order as the court thinks fit.

(2) Where a court makes an order of restitution under section 653 or 654, it shall cause notice of the terms of the order or a copy of the order to be given to the person who is to be the beneficiary of the order.

(3) Any notice or copy of an order required to be given pursuant to this section or section 655.4 shall be given or served in such manner as the court directs or as may be prescribed by rules of court made under section 438.

(4) Where a court makes an order of restitution under section 653 or 654, it shall enter the terms of the order in the record of the proceedings or, where the proceedings are not recorded, the order and the terms thereof shall be in writing.

PRIORITY TO RESTITUTION.

655.3 Where the court finds it applicable and appropriate in the circumstances of a case to make, in relation to an offender, an order of restitution under section 653 or 654, and

(a) an order of forfeiture under this or any other Act of Parliament may be made in respect of property that is the same as property in respect of which the order of restitution may be made, or

(b) the court is considering ordering the offender to pay a fine and it appears to the court that the offender would not have the means and ability to comply with both the order of restitution and the order to pay the fine,

the court shall first make the order of restitution and shall then consider whether and to what extent an order of forfeiture or an order to pay a fine is appropriate in the circumstances.

EXTENSION OF TIME FOR PAYMENT OF ORDERS OF RESTITUTION—Notice to beneficiary—Maximum extension for payment of restitution.

655.4 (1) Subject to subsection (2), where an order of restitution made under section 653 or 654 specifies a period within which or instalments in which payment is to be made, the court that made the order may, unless an information has been laid under section 655.6, on an application by or on behalf of the offender, extend the period or vary the instalments, subject to rules of court made under section 438.

(2) Before extending the period within which or varying the instalments in which payment is to be made pursuant to an order of restitution made under section 653 or 654, the court may direct that notice be given to, and may hear, the beneficiary of the order.

(3) A court shall not extend the period within which payment of restitution is to be made pursuant to subsection (1) to a date later than the expiration of the fourth year after the day on which the order of restitution was made under section 653 or 654, as the case may be.

ENFORCEMENT OF ORDERS OF RESTITUTION.

655.5 Where an order of restitution made under section 653 or 654 is not complied with forthwith, the beneficiary of the order may, by filing the order, enter it as a judgment in the superior court of the province in which the trial was held and that judgment is enforceable against the offender in the same manner as if it were a judgment rendered against the offender in that court in civil proceedings.

IDEM—When default in payment of restitution—Limitation—Hearing—Disposition after hearing—Effect of judgment—Notice—Maximum extension for payment of restitution—Service of term of imprisonment—Endorsement of order as varied.

655.6 (1) Any person who, on reasonable grounds, believes that an offender has failed or refused to comply with, or defaulted under, an order of restitution made under section 653 or 654 may lay an information in writing and under oath before a justice who shall receive the information, and the matter shall be dealt with by the court that made the order or any other court that would, having regard to the mode of trial of the offender, have had jurisdiction to make the order or, with the consent of the prosecutor and the offender, by any other court of criminal jurisdiction or superior court of criminal jurisdiction.

(2) The payment of an amount by way of restitution is in default when any part of the amount is due and unpaid on the day fixed or provided for payment under the terms of the order of restitution.

(3) No proceedings under subsection (1) shall be instituted more than six years after the date of the alleged failure or refusal to comply or alleged default.

(4) The justice who receives an information under subsection (1) shall require the offender to appear before the court that, pursuant to subsection (1), is to deal with the matter.

(5) At a hearing held pursuant to this section, the court shall hear the prosecutor and the offender and, where the court is satisfied that the offender has failed or refused, without reasonable excuse, the proof of which lies on the offender, to comply with the order of restitution made in relation to that offender, the court shall

(a) direct that the order be filed and entered as a judgment for the unpaid amount of the order in the superior court of the province in which the trial was held; and

(b) if it is appropriate in the circumstances, impose on the offender a term of imprisonment not exceeding two years, where the order was made in respect of an indictable offence, or not exceeding six months, where the order was made in respect of a summary conviction offence.

(6) A judgment entered in a court pursuant to paragraph (5)(a) is enforceable against the offender in the same manner as if it were a judgment rendered against the offender in that court in civil proceedings.

(7) At a hearing held pursuant to this section, where an offender establishes that the offender had a reasonable excuse for failing or refusing to comply with the order of restitution made in relation to the offender, the court may, subject to subsections (7.1) and (8), extend any term of the order, including the period within which payment of restitution is to be made, and vary any other term of the order except the amount ordered to be paid.

(7.1) Before exercising any of the powers provided for in subsection (7), the court may direct that notice be given to, and may hear, the beneficiary of the order of restitution.

(8) A court shall not extend the period within which payment of restitution is to be made pursuant to subsection (7) to a date later than the expiration of the fourth year after the day on which the order of restitution was made under section 653 or 654, as the case may be.

(9) Any term of imprisonment imposed under this section shall be served consecutively to any other term of imprisonment that is being or is to be served by the offender unless the court orders otherwise.

(10) Where, under subsection (7), the court makes any changes or additions to an order or the terms or conditions thereof or changes the period for which an order is to remain in force, it shall endorse the order accordingly and cause the offender to be informed of its action and to be given a copy of the order so endorsed.

COMPELLING APPEARANCE.

655.7 The provisions of Parts XIV and XV with respect to compelling the appearance of an accused before a justice and with respect to release and detention apply, with such modifications as the circumstances require, to proceedings under section 655.6 and in particular, but without limiting the generality of the foregoing,

(a) a peace officer may arrest without warrant a person bound by an order made under section 653 or 654 who has contravened the order or who, on reasonable grounds, is believed to have contravened the order, where the peace officer has reasonable grounds to believe that, if the person is not so arrested, the person will fail to attend court in order to be dealt with according to law; and

(b) as if the references in those provisions of Parts XIV and XV to an "offence" were references to a "contravention of an order to make restitution".

REDUCTION OF IMPRISONMENT ON PARTIAL PAYMENT—Minimum that can be accepted—To whom payment made—Application of money paid—Priority to restitution.

655.8 (1) Where a term of imprisonment is imposed under section 655.6 for failure or refusal to pay an amount by way of restitution pursuant to an order made under section 653 or 654, the term shall, on the payment of part of the amount, whether the payment was made before or after the issue of a warrant of committal, be reduced by the number of days that bears the same proportion to the number of days in the term as the part paid bears to the total amount in respect of which the offender was imprisoned.

(2) No amount offered in partial payment shall be accepted unless it is sufficient to secure a reduction of sentence of one day, or a multiple thereof, and where a warrant of committal has been issued, no partial payment shall be received until any fee that is payable in respect of the warrant or its execution has been paid.

(3) Payment may be made under this section to the person who has lawful custody of the offender or to such other person as the Attorney General directs.

(4) Subject to subsection (5), a payment under this section shall be applied first to the payment in full of the amount by way of restitution and thereafter to the payment in full of the costs and charges of committing and conveying the offender to prison.

(5) Where a term of imprisonment is imposed for failure or refusal to pay both a fine and an amount by way of restitution, a payment under this section shall be applied first to the payment in full of any part of the amount to be paid by way of restitution that remains unpaid, and thereafter to payment in full of any part of the fine that remains unpaid.

[Note: All Section numbers in this paper are pursuant to the Criminal Code, R.S.C. 1970.]

Victim Fine Surcharge

Under amendments to Section 655 of the Criminal Code, persons convicted or discharged for offences under the Criminal Code, certain provisions of the Food and Drugs Act, or the Narcotic Control Act, are subject to the additional penalty of payment of a victim fine surcharge. Parliament has recognized that the provision of an increased level of services to victims of crime cannot be achieved without additional resources being made available to the criminal justice system. With existing fiscal restraints in the justice field, it was necessary to develop an alternative source of funds to finance the provision of victims services. The approach adopted by Parliament accepts the recommendation of the Federal-Provincial Task Force and the Working group that the concept of a victim fine surcharge be introduced into the sentencing process.

Section 655.9 of the Criminal Code states:

VICTIM FINE SURCHARGE—Exception—Written reasons for not making order—Amounts applied to aid victims—Regulations—Enforcement.

655.9 (1) Subject to subsection (2), where an offender is convicted or discharged under section 662.1 of an offence under this Act, Part III or IV of the Food and Drugs Act or the Narcotic Control Act, the court imposing sentence on or discharging the offender shall, in addition to any other punishment imposed on the offender, order the offender to pay a victim fine surcharge in an amount not exceeding

(a) fifteen per cent of any fine that is imposed on the offender for that offence or, where no fine is imposed on the offender for that offence, ten thousand dollars, or

(b) such lesser amount as may be prescribed by, or calculated in the manner prescribed by, regulations made by the Governor in Council,

subject to such terms and conditions as may be prescribed by regulations made by the Governor in Council.

(2) Where the offender establishes to the satisfaction of the court that undue hardship to the offender or the dependants of the offender would result from the making of an order under subsection (1), the court is not required to make the order.

(3) Where the court does not make an order under subsection (1), the court shall

(a) provide the reasons why the order is not being made; and

(b) enter the reasons in the record of the proceedings or, where the proceedings are not recorded, provide written reasons.

(4) A victim fine surcharge imposed under subsection (1) shall be applied for the purposes of providing such assistance to victims of offences as the Lieutenant Governor in Council of the province in which the surcharge is imposed may direct from time to time.

(5) The Governor in Council may, for the purposes of subsection (1), make regulations prescribing the maximum amount or the manner of calculating the maximum amount of a victim fine surcharge to be imposed under that subsection, not exceeding the amount referred to in paragraph (1)(a), and any terms and conditions subject to which the victim fine surcharge is to be imposed.

(6) Subsections 646(3) to (11) apply and section 646.1 does not apply in respect of a victim fine surcharge imposed under subsection (1).

The Province of Manitoba has now had several years' experience with a fine surcharge in respect of provincial enactment violations. In 1986, the Provincial Legislature in Manitoba enacted the Justice for Victims of Crime Act. This Act contained a Declaration of Principles with respect to victims interests, established a Victims Assistance Fund to be financed by a provincial surcharge on fines, and established a Victims Assistance Committee to promote the Principles declared in the Statute and to make recommendations to Government with respect to expenditures for victims services.

During the period from January 1, 1987 until March 31, 1988, provincial surcharge revenue in Manitoba amounted to $752,935.17. The Chairperson of the Victims Assistance Committee commented in the Committee's first annual report as follows:

> "The funds generated from the Victims Surcharge has enabled the Committee to provide resources to organizations who are, in various ways, attempting to redress the historical pattern of neglect that victims of crime have experienced in our society."

Martin E. Herschorn
February 1, 1989

SENTENCING NOW AND IN THE FUTURE

CHAPTER 6

FUTURE INITIATIVES - THE CHALLENGE OF CHANGE

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Crime is not a new problem in Canadian society. No modern society is free from crime. We are not about to eliminate crime. There should be no illusions about this.

Although public opinion polls can over-simplify matters, it is clear that many Canadians fear crime, primarily violent crime. Surveys show that Canadians tend to view the violent crime problem here as being comparable to that of the United States. It is not. There is a clear information gap between public perceptions of crime and the criminal justice system, and the reality of them. Public fear of crime is fed by tragic high-profile incidents such as the Conter, Ruygrok and Sepp murders.

The public thinks Canada's violent crime rate is about that of the U.S., whereas it is about one-fifth of the American rate. They think that violence is involved in 30 - 100% of all crime while it represents only 6% of total crime reported. They believe that homicide has increased since the abolition of the death penalty, whereas the homicide rate for 1987 was about 2% below the average for the last ten years.

The public under-estimates the severity of maximum sentences; for example, polls show that the public believes the statutory maximum penalty for breaking and entering a dwelling is four years while it is actually life. They believe that fewer than 40% of offenders receive a sentence of imprisonment for break and enter while actually over 60% are imprisoned for this offence.

They believe that over 60% of federal offenders receive parole, while only about a third are actually paroled. They think that 50% of federal parolees commit violent crimes before the sentences are completed, while the actual figure is 5%.

Public understanding is important because public credibility and trust must be at the core of efforts to reform criminal law and criminal justice. Thus, while policy-makers and governments must heed public opinion, it is essential to be cautious about acting on the basis of inaccurate public perceptions or simplistic reports of public opinion. Ultimately, the evolution of sound government policy - policy that has broad public support - is dependent on an informed public.

Incarceration is broadly viewed by the public as a solution to many of the crime problems we face, but there is little recognition of the limited effectiveness and the debilitating impacts of incarceration, and the costs (human as well as financial).

Disparity in Sentencing

The Canadian Sentencing Commission (1987) stated that there is "abundant evidence" of disparity in sentencing in Canada. Disparity is unwarranted variation in sentencing, that is, variation which cannot be explained or justified by reference to

principles. Since then, the Standing Committee on Justice and Solicitor General (Standing Committee, 1988) has reviewed the issue and concluded that "there is general consensus that unwarranted disparity should be eradicated".

Disparity in sentencing can take a number of forms: case to case disparity (the same judge giving different sentences to similar cases, or the same sentence to cases that vary on relevant dimensions); judge to judge disparity; and court to court disparity, within the same province or from province to province. Surveys of judges find that the most frequently cited cause of disparity is the different personal attitudes or approaches of individual judges to sentencing. The Commission concludes that the heart of this problem is that there are no clear governing principles and no consensus as to how sentencing should be approached.

For many Canadians, disparity in criminal justice decisions is most troubling when it appears to take the form of differential treatment of rich and poor, white and non-white, rural and urban, and so on. This perception is sufficiently damaging to the credibility of the system among certain segments that it deserves particular attention.

Numerous official reports on conditional release have also cited as a concern the uncertainty and unexplained variation in release systems and decision making. Differences between the federal and provincial systems of conditional release, and differences among the various provincial systems, compound this problem.

On a broad level, the Canadian Sentencing Commission concluded that the existence of parole contributes to the problems of lack of clarity and predictability in sentencing. Offenders, the public, and the judges do not know at the time of sentencing when or whether a particular offender will be released on parole. This can lead to further inequities, since different judges approach the existence of parole and remission differently in their sentencing, and they have different understandings of the operation, availability, and likelihood of conditional release.

Other problems of proper integration among the various components of the sentencing, sentence administration and release systems exist. The Canadian Sentencing Commission persuasively documents the fact that the criminal law and each of its agencies are the product of piece-meal, incremental change, and there has been limited recognition of their interrelationships and dependencies.

Police, prosecuting attorneys, judges and corrections officials operate to a large degree in isolation from one another. The Canadian Sentencing Commission, the Correctional Law Review, and the Standing Committee all document some aspects of this isolation and fragmentation. The result is that each component has developed priorities, strategies, and unique practices to achieve what is perceived to be the most acceptable course for itself.

For example, the Canadian Sentencing Commission suggests that some judges adjust their sentences in light of the possibility of parole being granted; yet others do not: "There is no shared understanding of what a sentence of imprisonment actually means. It is, in fact, not possible to predict with any accuracy the actual time in custody that most inmates will serve."

Overreliance on Incarceration

Virtually all official reports on sentencing and corrections in Canada have declared that we rely too heavily on imprisonment as a criminal sanction. Among Western industrialized nations Canada has the second highest imprisonment rate, after the United States. We have half the imprisonment rate of the U.S., with only one-fifth their rate of violent crime.

Imprisonment is generally viewed as having limited long-term benefits in controlling crime, while being extremely costly in human and dollar terms. Over 20% of all criminal justice expenditures in Canada annually (including policing and the courts) go into imprisonment, while less than one per cent go to community-based sanctions. In the words of the 1986 Nielsen Task Force on Program Review: "Our over-reliance on incarceration is a luxury which is quickly becoming difficult to afford."

The Canadian Sentencing Commission concludes by agreeing with the John Howard Society of Alberta's assertion that "imprisonment in Canada and its over-use remains the central issue in sentencing policy and practice". The Commission accordingly proposes a sentence guideline system in which many offences would carry a presumption that a community-based sentence would be imposed. This contrasts with the Commission's conclusion on the current Criminal Code approach, "which displays an apparent bias toward the use of incarceration since for most offences the penalty indicated is expressed in terms of a maximum term of imprisonment".

A recent survey showed that, when given a choice between building more prisons or spending more money on alternatives to imprisonment, 70% of Canadians chose the latter. However, greater use of alternatives is hampered by what the Commission cites as the "definite lack of awareness of available community sanctions by

court officials". The Standing Committee suggests that "alternatives to imprisonment and intermediate sanctions, therefore, are increasingly viewed as necessary developments."

The Need for Clear Principles

The Canadian Sentencing Commission found that public concern about the system is in part caused by understandable confusion about the purposes and principles of sentencing and sentence administration. The Commission concluded, further, that the lack of a clear rationale for sentencing is at the heart of most of the problems with sentencing, and contributes to a loss of credibility and legitimacy.

The same is true of incarceration and conditional release. The 1977 all-party Parliamentary Sub-Committee on the Penitentiary System in Canada stated that the "fundamental absence of purpose or direction" in our use of imprisonment "creates a corrosive ambivalence that subverts from the outset the efforts, policies, plans and operations of the administrators...".

Numerous official reports, including the Standing Committee, have called for legislated statements which would define the acceptable and non-acceptable reasons for imposing a sentence of incarceration, and would clarify the mandate of prison officials

during the custodial period. The Standing Committee also called for parole decision making criteria to be placed in law.

It is becoming increasingly apparent that there is a need for the objectives and principles of each component to be articulated and made consistent and compatible.

Recent Developments

Calls for reform in the use (frequency and length) of imprisonment sentences in Canada, as well as for reform in conditional release, have been remarkably consistent in substance over the past few decades. Although calls for sentencing reform more generally have been less prominent, the Canadian Sentencing Commission has left a strong legacy for change. Public interest in sentencing remains high also as a result of the debate and free vote on capital punishment.

The continuation of conditional release in some form is supported by virtually all official reports. Indeed, many relatively recent reports have called for an increase in the use of conditional release. Calls for reform of release have tended to focus on the need for greater clarity, certainty and accountability.

The mandate of the Canadian Sentencing Commission recognized that "the sentencing of offenders is an integral part of the criminal justice system" and that "unwarranted disparity in sentences is inconsistent with the principle of equality before the law". Accordingly, the Commission's terms of reference called upon the Commission to "develop model guidelines for sentencing" and to "advise on ... the relationships which exist and which should exist between the guidelines and other aspects of criminal law and criminal justice, including ... the parole and remission provisions of the Parole Act and the Penitentiary Act ...".

In March, 1987, the Commission issued a report which produced model guidelines for sentencing, as well as recommendations which called for:

- a legislated statement of the purpose and principles of sentencing, and guidelines governing the use of sentences;
- the creation of a Permanent Sentencing Commission (PSC) to develop presumptive sentencing guidelines for all offences, to serve as a policy centre on sentencing, and to collect and disseminate information on sentencing in Canada;
- the development of alternatives to incarceration;
- significant reductions in the range of the sentence which would be subject to conditional release.

In effect, the Commission supported shorter average sentences for most crimes, as well as a lesser role for conditional release, such that the amount of time served in custody would be much closer to the term actually imposed by the sentencing judge. This was supported on the basis that parole makes sentences less equitable since people will be released from prison for reasons possibly unrelated to the behaviour which justified the penalty in the first place - carceral sentences were to be imposed primarily as denunciation for the offence committed, not for treatment nor, in most cases, in order to separate dangerous persons from society.

The Standing Committee supported many of the recommendations of the Canadian Sentencing Commission, including a legislated statement of purposes and principles, greater use of alternatives to imprisonment, and the creation of a PSC to develop guidelines for sentencing judges. The guidelines, however, were to be advisory only. The report of the Standing Committee, in contrast to the Canadian Sentencing Commission, supported conditional release, but with modifications to periods of eligibility, as well as open parole hearings, more training for parole board members, and other reforms. The Canadian Bar Association has recently issued a number of papers on sentencing and sentence administration issues, which have generated interest as well as a momentum for further analysis.

The Standing Committee clearly recognized the danger of proceeding with conditional release reform in the absence of effective sentencing reform: for the majority of offenders, it would not be desirable or justifiable to increase the amount of time actually served in custody. The Standing Committee accordingly recommended that parole "decision making patterns and judicial sentencing practices (should be) adapted to a later parole eligibility date". In August, 1988, both the then Minister of Justice and the then Solicitor General announced proposals which would result in reform of sentencing and conditional release respectively.

The then Minister of Justice, Mr. Hnatyshyn announced an agenda which would include the release of a public discussion paper on sentencing to allow Canadians to participate in discussions of sentencing reform; a legislated statement of the purpose and principles of sentencing; consideration of the establishment of a permanent sentencing commission (PSC); creation of advisory guidelines on sentencing; and education programs on sentencing for judges and students of law and criminology. He also stressed that any programme of reforms would take into account the experiences and reality of native people in Canada. He announced at that time that the Department was contributing financially to a national workshop held in October of women active in virtually all aspects of criminal justice. All of these initiatives form the basis of possible change.

Legislated Statements of Purpose and Principles

Legislated statements of the overall purposes and governing principles of sentencing, sentence administration, and conditional release would provide a rationale for, and give direction to, these processes. Developed together in a coherent fashion, they would promote compatibility and consistency among the various stages of a criminal disposition. However, if unaccompanied by other reforms, they would be unlikely to have much practical impact.

Thus, such statements would address the problem of the need for clear objectives and principles, as well as contributing to the development of coherent policies, addressing disparity and the lack of integration among components, and helping to inform the public about the objectives of the system, thus laying a foundation for allaying public fears.

The primary goal served by such an initiative is openness. As the Canadian Sentencing Commission and the Standing Committee recognized, public understanding of the system (which is aided by such openness) is fundamental to building public support and trust. Fairness would also be promoted by the articulation of meaningful principles. Consistent and purposeful direction is considered essential to modern criminal justice systems.

Guidelines for Sentencing

Effective guidelines for sentences have been considered the most promising approach for reducing unwarranted disparity in sentencing. To the extent that they clearly establish the normal disposition for a given offence, they could also increase public confidence. They would constitute specific statements of sentencing policy for criminal acts done by offenders with certain characteristics and could therefore also contribute to coherent policies governing various related processes.

It is essential that sentence guidelines, if established, be established with sentence administration and conditional release provisions in mind and always with an eye to their impact on prison populations. The Canadian Sentencing Commission geared its exemplary guidelines and its support for the greater use of community-based sanctions to its conclusion that Canadian prison populations should decrease. Our over-use of incarceration should, thus, be addressed in the guideline-setting exercise, both by guidelines as to which offenses/offenders should normally receive a community-based sentence and which should receive a term of imprisonment, and if so of what length.

Effective guidelines would address the goals of rebuilding public confidence and trust, openness, fairness, and effective use of resources. By creating clear sentencing policy, they would be consistent with a modern criminal justice system. There are various possible approaches to guidelines, which have varying degrees of likely impact. One approach would be to legislate guidelines: Parliament would prescribe a narrow range of possible penalties for each major offence differentiating between classifications of the offence and offender. However, legislated guidelines are rigid and therefore eliminate, to a very large extent, sentencing discretion and the ability to individualize sentences. This form of guideline is also very difficult and time-consuming to amend therefore making updating and revision less likely.

Alternatively, the guidelines could be advisory or persuasive only. Advisory guidelines would seek to guide judges in their decisions but would not bind them to impose a specific sentence. These advisory guidelines could be developed by a permanent sentencing commission which would be created especially for that task. The Canadian Sentencing Commission recommended that it (FSC) be composed of judges, experts in the sentencing field and representatives of various interests in the criminal justice system and the community. It would develop, evaluate and update sentencing guidelines and perform other functions such as

information collection, dissemination and education. It would be an independent agency and, as such, could conduct the extensive consultations with the profession and the public necessary to develop and update the guidelines.

Public Education

It is clear that public fear and concern is often rooted in incorrect assumptions and misunderstandings about criminal justice and criminals. The Standing Committee concluded that public education was essential to criminal justice. The Canadian Sentencing Commission too suggested that the evolution of sound government policy - policy that has broad public support - is dependent on an informed public. This requires a coordinated effort among all involved parties.

Public education is indispensable to rebuilding public trust and achieving openness. To the extent that it is effective in shaping public perceptions, better public education would promote a fairer system by alleviating public pressures based on misunderstanding.

Information

A basic failing of our system is the lack of systematic information about how crimes and criminals are being dealt with. Although a

new information system being implemented for federal corrections will increase knowledge in this area, there is still a need to develop and implement information systems to inform those within the criminal justice system and permit them to make consistent and equitable decisions.

Better information, and the communications strategies to disseminate this information, would address the problem of public fears and concerns by permitting demystification of the system. It would also address the need for objectives and principles and permit a better understanding of the current norms within the system. Clearly, each of the goals of rebuilding public confidence and trust, openness, fairness, and effectiveness would also be served by the creation of operational information of this sort.

Intermediate Sanctions

The Standing Committee, Sentencing Commission, and many other official reports have called for the development of a greater range of non-carceral sanctions and programs. These are supported on the grounds both of greater effectiveness and cost savings. As forms of sentence, these would principally affect offenders at the provincial level (i.e., persons serving less than two years), but in some cases would require empowering federal legislation. There is some concern that the development of alternative

sanctions could, rather than directing offenders from prison, simply result in minor offenders being dealt with relatively more severely, thus raising system costs.

This initiative could address the problem of over-reliance on incarceration. In addition, if accompanied by clear policy respecting the use of such sanctions, it could enhance integration among the components of the system, contribute to clear objectives and principles, and promote a coherent criminal justice policy. In addition, by creating a wider range of programs and options, the proposal could enhance fairness by promoting more appropriate choices of disposition. Such an initiative would also be consistent with creating a more modern and open system, and with making the most effective use of resources of all kinds.

Revised Penalty Structures

The Canadian Sentencing Commission recommended the repeal of the current penalty structure in the Criminal Code including maxima and minima (other than for murder and high treason) and its replacement by maximum penalties that more closely reflect average sentences and current thinking about the relative seriousness of offenses. In this latter respect, the goals of achieving greater openness and fairness could be served.

The Standing Committee concluded that this initiative would not enhance public confidence in the system, and attached more importance to the use of sentence guidelines. Because maximum sentences would still need to be relatively severe (in order to allow for relatively serious instances of various crimes). a new penalty structure is also considered unlikely to reduce disparity. It might, however, be achieved in the context of a review of substantive criminal offenses.

Fine Default

The issue of what action ought to be taken when an offender defaults in payment of a court ordered fine, is not a new one as was seen recently in this province. It is, however, one which has never been conclusively resolved. The Canadian Sentencing Commission devoted many pages to a detailed discussion of fine default. The recommendations put forward in its report were later endorsed by the Standing Committee. Problems in this area were also discussed at the Uniform Law Conference in August 1983.

The ultimate goal of any initiative on fine default would be to lessen the reliance on imprisonment for default of payment of fines. Of primary concern is the quasi-automatic prison term now imposed for fine default which disproportionately affects the poor. Several possible approaches to the problem have been suggested

including amending the Criminal Code to require the sentencing judge to inquire as to the financial ability of an offender to pay a fine prior to its imposition. Accordingly, the mode and conditions of payment could be set so that incarceration would only be used where a wilful breach of a community sanction had occurred.

This initiative would involve an in-depth examination of the use of fines and sanctions related to default.

CONCLUSION

All of the above initiatives seek in some way to address the challenge of change. It is important to bear in mind that each of us has a vital role to play in bringing out change if it is to be change for the better.